139-210

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 151.

S. G. BAYNE, J. M. FULLER, AND T. J. MELVIN, PLAINTIFFS IN ERROR,

vs.

D. B. WIGGINS AND JANE M. WIGGINS, HIS WIFE, IN RIGHT OF THE SAID JANE M. WIGGINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 6, 1887.

ment on the first Wednesday in December next, ensuing the day of election for the purpose of voting for President and Vice-President of the United States and shall after giving their votes seal up and transmit the same agreeably to an act of congress.

SEC. 9. Be it enacted, That the said Electors shall receive as a compensation for their services the same pay for each twenty-five miles they may necessarily travel in going to and returning from the seat of Government, and for each day they may be necessarily engaged in and about delivering their votes so as aforesaid as is received by the members of this General Assembly, which sums of money shall be paid to the said Electors, by either of the Treasurers of this State out of any moneys in the treasury not otherwise appropriated, by virtue of a draft or drafts to be drawn by the Governor in favor of said Electors.

SEC. 10. Be it enacted, That if any one or more of the persons chosen Electors to elect a President and Vice-President shall fail to attend at the seat of Government at three of the clock in the afternoon of the day pointed out by law for them to assemble and give their votes, then and in that case or in any other case of failure the persons attending as electors shall proceed to elect some other person or persons to supply the places of the absent elector or electors, and the person or persons so chosen shall be entitled to vote for President and Vice-President in the same manner as the absent elector or electors would be entitled to if present; Provided, the elector or electors whose places are intended to be supplied should not attend and be ready to vote before the votes of the other electors are given and sealed up.

JNO. H. CAMP,
Speaker of the House of Representatives.
W. HALL,
Speaker of the Senate.

NOVEMBER 9, 1827.

Read, compared and found to be correct,

TH. FLANAGHAN,
Librarian.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 *Copy of Præcipe for Summons.*

In the Court of Common Pleas of McKean County, Pennsylvania.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins, *vs.* S. G. BAYNE, J. M. FULLER, and S. J. MELVIN. } No.—. Feb'y Term, 1884.

Issue summons in trespass on the case upon promises in above, entitled case, returnable to the fourth Monday of January, 1884.

B. D. HAMLIN AND WOLF & GEORGE,
Att'ys for Pl'ffs.

To Jno. B. Brawley, Esq., prothonotary.

Endorsed: No. 204. Feb'y term, 1844. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *vs.* S. G. Bayne, J. M. Fuller, and T. J. Melvin. Præcipe for summons. Filed and issued Jan'y 15th, 1884. Entered. Wolf & George, B. D. Hamlin, pl'ffs' att'ys.

2 *Copy of Summons.*

STATE OF PENNSYLVANIA, *McKean County,* } *ss:*

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon S. G. Bayne, J. M. Fuller, and T. J. Melvin so that they be and appear before our court of common pleas to be holden at Smethport, in and for said county, on the fourth Monday of January inst., to answer D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, in a plea of trespass on the case upon promises. Damages claimed, —. And have you then there this writ.

Witness the Honorable A. G. Olmstead, president of our said court, this 15 day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Common Pleas Seal.

JOHN B. BRAWLEY, *Prothonotary,*
Per HUGH P. BRAWLEY, *Deputy.*

Served the within summons, January 21st, 1884, upon S. G. Bayne by giving to him a true and attested copy thereof, informing him of its contents, and January 25th, 1884, served the same upon T. J. Melvin by giving to him a like copy, informing him of its contents, and January 26th, 1884, served the same upon J. M. Fuller by giving to him a like copy, informing him of its contents. So answers—

A. I. WILCOX,
Per R. E. WHITELY,
Dep'y Sheriff.

3 Summons endorsed: No. 204. Feb'y term, 1884. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *versus* S. G. Bayne, J. M. Fuller, and T. J. Melvin. Summons.

4 *Copy of Narr.*

In the Court of Common Pleas of McKean County, Pennsylvania.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. MELVIN.
} No. —. Feb'y Term, 1884.

McKEAN COUNTY, *ss:*

S. G. Bayne, J. M. Fuller, and T. J. Melvin, late of said county, defendants, were summoned to answer D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, plaintiffs, in a plea of trespass on the case upon promises.

And thereupon the said plaintiffs, by B. D. Hamlin and Wolf and George, their attorneys, complain—

For that whereas, heretofore, to wit, on or about the twenty-first day of November, in the year of our Lord one thousand eight hundred and eighty-three, the said Jane M. Wiggins, being then as now, ever since, and theretofore seized in her demesne as of fee and in quiet, peaceable, and undisturbed possession, by title good and sufficient and indefeasible, of a certain piece, parcel, or tract of land situate, lying, and being in La Fayette township, McKean county, Pennsylvania, and bounded and described as follows, to wit:

Beginning at a beech tree at the northwest corner of lot No. 44 of the Fox estate, in said La Fayette township, McKean county, Pennsylvania, thence north by unseated land twenty-eight perches and three-tenths of a perch to a post; thence by unseated land eighty-nine and two-thirds degrees west one hundred and eleven and seven-tenths perches to a post; thence by unseated lands south
5 forty and one-tenth perches to a post, west fifty perches to a post; thence by unseated land south seventeen and three-sixths degrees east one hundred and twenty-six and five-tenths perches to a beech; thence by unseated land south eighty-nine and one-fourth degrees east one hundred and fifty-nine and two-tenths perches to a post; thence north by the west line of lot 44 one hundred and forty-one and four-tenths perches to the place of beginning, containing one hundred and forty-seven and three-tenths acres, with the usual allowance of six per cent. for roads, the same being part of warrants Nos. 3432 and 3433, excepting and reserving therefrom and thereout all that part and portion theretofore conveyed by the said Jane M. Wiggins and D. B. Wiggins, her husband, by deed dated December 25th, 1882, to Timothy Mullin, Jr., and recorded in the office for the recording of deeds, &c., in and for

McKean county, Pennsylvania, in Deed Book No. 19, page 63, &c., bounded and described as follows, to wit: All that certain piece or parcel of land situated in La Fayette township, McKean county, Pennsylvania, beginning at a post the northeast corner of the Wiggins lot, thence along the east line of said lot south one degree and thirty minutes east eighty-six and fifteen-hundredth rods to a post; thence south 88 degrees and 15 minutes west one hundred and sixty-three and forty-five hundredths rods to a post in the west line of said lot; thence along said west line north one degree and forty-five minutes west forty-four and nine-tenth rods to the west northwest corner of said lot; thence along the lot line north 88 degrees 15 minutes east fifty and seven-tenths rods to a post; thence along lot line one degree and forty-five minutes west forty-one rods to the northwest corner of said lot;
6 thence along the north line of said lot north 88 degrees east forty-three and four-tenths rods to a post, and thence continuing on said north line north 88 degrees 15 minutes east sixty-nine and seven-tenths rods to the place of beginning, containing seventy-five acres, more or less, and being part of lot 46 and part of warrants 3432 and 3433, did, through D. B. Wiggins, her husband, then and there in her behalf acting and employed and by power and authority to him by her given, contract and agree verbally and by parol to and with the said defendants for the sale and conveyance unto them of the said piece, parcel, or tract of land for the sum of ten thousand dollars, the said defendants then and there promising and agreeing to take the said land and upon the delivery to them of a good deed for the same to pay the said sum of ten thousand dollars in the manner following, to wit: Five thousand dollars in cash upon the delivery of the said deed, two thousand five hundred dollars, with interest, in three months from the date of said deed, and two thousand five hundred dollars, with interest, in six months from the date of said deed; which said deferred payments were to be evidenced by notes made and drawn by the said defendants in favor of the said Jane M. Wiggins; that the said defendants, as earnest and for the purpose of rendering firm and effectual the said contract and agreement, did then and there, prior to and before the making of the said deed, pay unto the said D. B. Wiggins for the said Jane M. Wiggins—the said D. B. Wiggins being then and there in behalf of and for the said Jane M. Wiggins acting and employed as aforesaid—a part and portion of the said cash payment of five thousand dollars, to wit, the sum of two hundred and fifty dollars, and, further, as earnest and for the purpose of rendering firm and effectual the said contract and agreement, did then and there deposit with W. W.
7 Bell, Esq., cashier of the First National Bank of Bradford City, Pennsylvania, the balance of the cash payment aforesaid, to wit, the sum of four thousand seven hundred and fifty dollars, the said sum to be remitted to the said D. B. Wiggins by the said W. W. Bell, along with the notes aforesaid, upon the forwarding of a good deed for the said land; and, further, the said defendants, in pursuance of the said contract and agreement, did cause to

be prepared by eminent counsel by them in such behalf especially employed a good deed for the proper assuring and conveyance unto them of the said land according to the true intent and meaning of the said contract and agreement; that accordingly the said plaintiffs, accepting the said contract and agreement and in full compliance therewith in good faith, did promptly and without delay execute and acknowledge in due form of law the deed so caused to be prepared by the said defendants as aforesaid and tender the same to the said defendants. Yet the said defendants, disregarding the said contract and agreement and in violation and breach thereof and their duty therein and in fraud of the rights of the said plaintiffs, did refuse and still do refuse to receive the said deed and conveyance; did refuse and still do refuse to permit or allow the said W. W. Bell to pay over or remit the said sum of four thousand seven hundred and fifty dollars so deposited with him as aforesaid; have failed, neglected, and refused to make and draw and deliver, and still do neglect and refuse to make and draw and deliver, the notes as in and by the said contract and agreement they were and are required to make and draw and deliver, and other wrongs and things have done in breach and violation of the said contract and agreement.

8 Wherefore the said plaintiffs complain and say that by reason of the said violations, breaches, and wrongs so done, made, and caused by the said defendants as aforesaid they are worse and have sustained damage in the sum of ten thousand dollars; and also for that whereas, heretofore, to wit, on or about the twenty-first day of November, in the year of our Lord one thousand eight hundred and eighty-three, at the county aforesaid, the said defendants became indebted to the said plaintiffs in the sum of ten thousand dollars for the consideration and purchase price of a certain piece, parcel, or tract of land situate, lying, and being in La Fayette township, McKean county, Pennsylvania, and bounded and described as follows, to wit: Beginning at a beech tree, the northwest corner of lot No. 44 of the Fox estate, in said La Fayette township, McKean county, Pennsylvania, thence north by unseated land twenty-eight perches and three-tenths of a perch to a post; thence by unseated land eighty-nine and two-thirds degrees west one hundred and eleven and seven-tenths perches to a post; thence by unseated land south forty and one-tenth perches to a post, west fifty perches to a post; thence by unseated lands south seventeen and three-sixths degrees east one hundred and twenty-six and five-tenths perches to a beech; thence by unseated land south eighty-nine and one-fourth degrees east one hundred and fifty-nine and two-tenths perches to a post; thence north by the west line of lot 44 one hundred and forty-one and four-tenths perches to the place of beginning, containing one hundred and forty-seven and three-tenths acres, with the usual allowance of six per cent. for roads, the same being part of warrants Nos. 3432 and 3433, excepting and reserving therefrom and thereout all that part and portion theretofore conveyed

9 by the said Jane M. Wiggins and D. B. Wiggins, her husband, by a deed dated December 25th, 1882, to Timothy

Mullin, Jr., and recorded in the office for the recording of deeds, &c., in and for McKean county, Pennsylvania, in Deed Book No. 19, page 62, &c., bounded and described as follows, to wit: All that certain piece or parcel of land situate in La Fayette township, McKean county, Pennsylvania, beginning at a post the northeast corner of the Wiggins lot, thence along the east line of said lot south one degree thirty minutes east eighty-six and fifteen-hundredths rods to a post; thence south 88 degrees 15 minutes west one hundred and sixty-three and forty-five hundredths rods to a post in the west line of said lot; thence along said west line north one degree and forty-five minutes west forty-four and nine-tenths rods to the west northwest corner of said lot; thence along the lot line north 88 degrees 15 minutes east fifty and seven-tenths rods to a post; thence along lot line north one degree and forty-five minutes west forty-one rods to the northwest corner of said lot; thence along the north line of said lot 88 degrees east forty-three and four-tenths rods to a post, and thence continuing on said north line north 88 degrees 15 minutes east sixty-nine and seven-tenths rods to the place of beginning, containing seventy-five acres, more or less, and being part of lot 46 and part of warrants 3432 and 3433, which the said defendants did then and there agree to purchase, to take, and to pay and secure to be paid therefor the said sum of ten thousand dollars, but which said land the said defendants did neglect and refuse and still do neglect and refuse to purchase, to take, and to pay for and secure to be paid therefor the said sum of ten thousand dollars, though often requested so to do and though a good and sufficient deed for
10 the proper assurance and conveyance of the said land unto the said defendants in fee simple was promptly and without delay in due form of law made, executed, acknowledged, and tendered by the said plaintiffs to the said defendants. Nevertheless the said defendants, not regarding their said several promises and undertakings, have not paid the said sum or sums of money or any of them or any part thereof to the said plaintiffs, although often requested so to do, but the said defendants have hitherto neglected and refused and still do neglect and refuse to pay the same to the said plaintiffs, to the damage of the said plaintiffs in the sum of ten thousand dollars, and therefore they bring suit, &c. Common counts added.

B. D. HAMLIN AND
WOLF & GEORGE,
Att'ys for Pl'ffs.

Endorsed: No. 204. Feb'y term, 1884. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *vs.* S. G. Bayne, J. M. Fuller, and T. J. Melvin. *Narr.* Filed Jan'y 15, 1884.

11 *New Counts to the Declaration.*

And for that whereas, afterwards, to wit, on the said twenty-first day of November, in the year of our Lord one thousand eight hundred and eighty-three, at the county aforesaid, the said Jane M.

Wiggins, being seized as of fee of, in, and to the said before mentioned and described piece or parcel of land, did sell unto the defendants the said piece or parcel of land for the price or sum of ten thousand dollars, and the said defendants did then and there promise and agree, in consideration of the premises and of the delivery of a good deed of the same premises thereafter to be made, to pay to the said plaintiff the sum of ten thousand dollars, in manner following, to wit: Five thousand dollars upon the delivery of the said deed, and two thousand five hundred dollars, with interest, in three months from the date of the said deed, and two thousand five hundred dollars, with interest, in six months from the date of said deed; and afterwards, to wit, on the twenty-eighth day of November, A. D. one thousand eight hundred and eighty-three, the plaintiff did deliver to the defendants a good and sufficient deed of the said premises heretofore described and mentioned, and did deliver possession of the same premises to the same defendants.

And the plaintiff avers that the defendants afterwards, to wit, on the day and year last aforesaid, did enter into possession of the said piece or parcel of land; and afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in the western district of Pennsylvania, further in consideration of the premises and of their several promises and undertakings theretofore made, did promise and agree that they, the said defendants, would pay to the plaintiff
the said sum of ten thousand dollars, in manner and form
12 and at the several times as in the said agreement mentioned.

Yet the said defendants, though often requested the said sum of money to pay, have neglected and refused and still do neglect and refuse, to the damage of the plaintiff twenty thousand dollars.

WOLF & GEORGE,
DAVENPORT & GRIFFITH,
Att'ys for Pl'ffs.

Endorsed: No. 4. July term, 1885. Wiggins *vs.* Bayne *et al.* New counts, &c. Filed July 27, 1886, by leave of court. F. W. Grant, dep. clerk.

13 *Copy of Affidavit of Defence.*

In the Court of Common Pleas of McKean County.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. MELVIN.

No. 204.
February Term, 1884.

McKEAN COUNTY, *ss:*

Personally appeared J. M. Fuller, one of defendants above named, who, being duly sworn according to law, deposes and says that the defendants in the above-entitled case have a just, full, and legal de-

fense to the whole of the plaintiffs' claim, the nature and character of which they do not set forth, because they believe and are informed by their counsel that under the law and rules of court the plaintiffs are not entitled to an affidavit of defence to their pleadings in this suit, and that the said defendants are not indebted to the said plaintiffs in any sum or manner whatever.

J. M. FULLER.

Sworn and subscribed before me this 30th day of January, A. D. 1884.

[NOTARIAL SEAL.] F. W. HASTINGS,
Notary Public.

Endorsed: No. 204. Feb'y term, 1884. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *vs.* S. G. Bayne, J. M. Fuller, and T. J. Melvin. Affidavit of defense. Filed January 31, 1884.

14 *Copy of Plea.*

(Extract from docket entries of common pleas.)

"1884, March 29.—Def'ts, by att'ys, plead non-assumpsit, payment with leave, &c., and set-off."

15 *Copy of Petition, &c., for Removal of Cause to Circuit Court.*

In the Court of Common Pleas of McKean County.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins, *vs.* S. G. BAYNE, J. M. FULLER, and T. J. MELVIN. } No. 204. Feb. Term, 1884.

To the honorable the judges of said court:

The petition of D. B. Wiggins and Jane M. Wiggins, his wife, the above-named plaintiffs, respectfully showeth unto your honors that the controversy in this suit is between citizens of different States; that your petitioners were at the time of the commencement of this suit and still are citizens of the State of New York, and that the defendants were at the time of the commencement of this suit and still are citizens of the State of Pennsylvania, and that the matter and amount in dispute in the said suit exceeds, exclusive of costs, the sum or value of five hundred dollars. Your petitioners herewith offer a bond, with good and sufficient surety, conditioned for their entering in the circuit court of the United States for the third circuit in and for the western district thereof, on the first day of its next session, a copy of the record in this suit, and for the payment of all costs that may be awarded by said circuit court if the said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore *he* prays your honorable court to proceed no further

therein except to make the order of removal required by law and to accept the said bond and surety and cause the record herein to be removed into said circuit court; and they will, as in duty bound, every pray, &c.

D. B. WIGGINS.
JANE M. WIGGINS.

16 STATE OF NEW YORK, } ss:
County of Erie, }

Before me, a notary public in and for said county, personally came the above-named D. B. Wiggins and Jane M. Wiggins, who, being duly sworn according to law, depose and say that all and singular the statements by them made in the foregoing petition are true. They further depose and say that they have reason to believe and do believe that from prejudice or local influence they will not be able to obtain justice in said State court. Further they say not.

D. B. WIGGINS.
JANE M. WIGGINS.

Sworn and subscribed before me this 24th day of February, A. D. 1885.

[NOTARIAL SEAL.] Witness my hand and official seal the day and year last above mentioned.

JOHN L. ROMER,
Notary Public.

Endorsed: No. 204. Feb'y term, 1884. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *vs.* S. G. Bayne, J. M. Fuller, and T. J. Melvin. Filed and entered Feb'y 26, 1885.

17 Know all men by these presents that we, D. B. Wiggins and Jane M. Wiggins, of the county of Erie, State of New York, as principals, and John B. Weber and Frank Hammond, of Erie county, N. Y., as sureties, are held and firmly bound unto S. G. Bayne, J. M. Fuller, and T. J. Melvin, of ——, in the sum of one thousand dollars, lawful money, to be paid to the said S. G. Bayne, J. M. Fuller, and T. J. Melvin, their certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators and every of them, firmly by these presents.

Sealed with our seals and dated the 20th day of February, A. D. 1885.

The condition of this obligation is such that if the above-bounden D. B. Wiggins and Jane M. Wiggins, who are the plaintiffs in a certain action now pending in the court of common pleas of McKean county, Pennsylvania, at No. 204, February term, 1884, of said court, wherein the said S. G. Bayne, J. M. Fuller, and T. J. Melvin are defendants, and who have petitioned the said court for a removal of the said suit into the circuit court of the United States for the third circuit in and for the western district thereof, shall enter in the said circuit court on the first day of its next session a copy of the record

in said suit and shall well and truly pay all costs that may be awarded by said circuit court if said court shall hold the said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and virtue.

D. B. WIGGINS. [SEAL.]
JANE M. WIGGINS. [SEAL.]
JOHN B. WEB-R. [SEAL.]
FRANK HAMMOND. [SEAL.]

18 STATE OF NEW YORK, } ss:
County of Erie, }

On this 24th day of February, A. D. 1885, before me, the subscriber, appeared Dennis B. Wiggins, Jane M. Wiggins, John B. Weber, and Frank Hammond, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

[NOTARIAL SEAL.] JOHN L. ROMER,
Notary Public.

STATE OF NEW YORK, } ss:
County of Erie, }

John B. Weber and Frank Hammond, being severally sworn, each for himself says—the said John B. Weber that he is a freeholder of the county of Erie, in this State, and that he is worth the sum of $5,000.00 over and above all debts and liabilities which he owes or has incurred exclusive of property exempt by law from levy and sale under an execution; and that the said Frank Hammond for himself says that he is a householder of the county of Erie, N. Y., in this State, and that he is worth the sum of $5,000.00 over and above all debts and liabilities which he owes or has incurred exclusive of property exempt by law from levy and sale under an execution.

JOHN B. WEBER.
FRANK HAMMOND.

Severally sworn to and subscribed to before me this 24th day of February, 1885.

[NOTARIAL SEAL.] JOHN L. ROMER,
Notary Public.

19 Endorsed: No. 204. February term, 1885. D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, *vs.* S. G. Bayne, J. M. Fuller, and T. J. Melvin. And now, to wit, February 26th, 1885, on hearing the petition filed in this case and on examination of the within bond, the said bond is accepted and approved, the within bond, and direct the proth'y to certify the record in this case to the circuit court in accordance with the prayer of the pl'ffs' petition. By the court. Filed and entered Feb'y 26th, 1885.

20 *Plea at Length.*

In the Circuit Court of the United States for the Third Circuit in and for the Western District Thereof.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. MELVIN.

And the said defendants, by N. B. Smiley and T. A. Morrison, their attorneys, come and defend the wrong and injury, when, &c., and say that they, the said defendants, did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them in the first count of the said plaintiffs' declaration, and of this they put themselves upon the country, &c.; and as to the residue of the said declaration the said defendants say that they did not undertake or promise in manner or form as in the said declaration is alleged, and of this the defendants put themselves upon the country, &c.

And for a further plea in this behalf the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that at the time of the supposed promises and undertakings as alleged in the first and second counts of the said plaintiffs' declaration the said Jane M. Wiggins was not and has not been since, up to time of the commencement of this suit, seized in her demesne as of fee by title good, sufficient, and indefeasible of, in, and to the land in the said first and second counts of the plaintiffs' declaration mentioned and described, but her supposed title was defective, insufficient, and
21 bad; and also that at the time of the supposed promises and undertakings as alleged in the said first and second counts of the plaintiffs' declaration the said D. B. Wiggins had no lawful authority to make any contract for the sale and conveyance of said land capable of being enforced, either in law or equity, against the said Jane M. Wiggins, and no such contract was made in the premises which is or was binding and obligatory upon either the said plaintiffs or defendants in this suit, and of this the defendants put themselves upon the country, &c.

N. B. SMILEY,
T. A. MORRISON,
Attorneys for Defendants.

Notice of Set-Off.

To plaintiffs or their attorneys:

Take notice that the above-named defendants on the trial of this case will give in evidence and insist that the above-named plaintiffs, before and at the time of the commencement of this suit, were and still are indebted to the said defendants in the sum of five hundred

dollars, lawful money of the United States, for money before that time lent by the defendants to the plaintiffs at their request, and in the sum of five hundred dollars for money before that time received by the plaintiffs for the use of the defendants, and in the sum of five hundred dollars for money found to be due from the plaintiffs to the defendants in an account before that time stated between them, and that the defendants will set off in said trial so much of the said several sums of money so due and owing from the plaintiffs to the said defendants against any demand of the said plaintiffs, to be
22 proved at the said trial, as will be sufficient to satisfy and discharge such demands, and will also then and there demand judgment against the said plaintiffs for the balance of said several sums of money due to the said defendants, according to the statute in such case made and provided.

N. B. SMILEY,
T. A. MORRISON.
Attorneys for Defendants.

Endorsed: No. 4. July term, 1885. D. B. Wiggins and Jane M. Wiggins, his wife, in right, &c., *vs.* S. G. Bayne *et al.* Defendants' plea at length. Filed May 7th, 1885. F. W. Grant, dep. clerk.

23 *Minutes of Trial.*

JULY 27TH, 1886.

The parties in this case being at issue and in court, a jury, being called, came, viz., J. B. Stephenson, Thomas Craig, Samuel Hoye, D. W. Moore, W. J. Milheim, Wm. A. Schrock, J. P. Burchfield, Henry C. Book, Joseph Law, Charles A. Frost, J. Scott Patterson, Ezra C. Doty, twelve good and lawful men, of the western district of Pennsylvania, who, having been duly summoned, balloted for, and empannelled, were sworn and affirmed to well and truly try the issue herein joined and a true verdict render according to the evidence.

Mr. Davenport opened for the plaintiffs and proceeded to offer evidence, and rested.

Mr. Morrison opened for the defendants and proceeded to offer evidence.

Court adjourned until to-morrow morning at 9 a. m.

JULY 28TH, 1886.

Court met pursuant to adjournment, and, the jury being called and in the box, trial proceeds; both sides close, and defendants' counsel submit and argue their points, which are answered by the court and facts argued to the jury by counsel.

Copy of Defendants' Points.

WIGGINS & WIFE
vs.
BAYNE *et al.*

The court is respectfully requested to charge the jury as follows, to wit:

1. The contract for the sale of the premises described in the plaintiffs' declaration being in parol, and there being no evidence that any possession thereof was taken by the defendants under and in pursuance of the contract, there can be no recovery of the
24 purchase price by the vendor unless the contract was fully executed by the delivery of a good and indefeasible deed for the land accepted by the vendees.

2. That until such delivery and acceptance the arrangement rested entirely in parol and was ineffectual to pass the title to the land to the vendees and render them liable to the vendor for the purchase-money by reason of the statue of frauds and perjuries.

3. If the defendants agreed in parol that the money and notes which were to be the consideration of the purchase should be delivered by Bell to the plaintiff on the receipt of the deed from her, the defendants had a right to rescind that agreement at any time before the receipt by Bell of such deed and the delivery of the money and notes to her.

4. If no notes or money were placed in the hands of Bell at the time of or subsequent to the alleged agreement by Fuller & Bayne that the deed should be forwarded to him (Bell) and the money and notes to be delivered to the plaintiff in payment of the consideration, and it was so known and understood by Wiggins, then there was nothing done by Bayne & Fuller towards an execution of the contract on their part, and they had the right and were at liberty to rescind it by notice to Bell not to receive the deed.

5. That a notice to Bell by Bayne & Fuller not to pay the money and deliver the notes at any time before the receipt of the deed by him and before the delivery of the money and notes was a rescission and relieved the defendants from any liability to the plaintiff for the purchase price.

6. That if Wiggins agreed with Bayne & Fuller to convey
25 to the defendants land, the title to which was in his wife, without disclosing her ownership, they had the right to refuse to execute the contract on that account when they learned that fact.

7. That if the agreement for the sale was in fact made by and for the wife of Wiggins the defendants were under no obligations to execute it and incurred no liability either for the purchase-money or for damages for refusal to execute it, because of the absence of mutuality of obligation and remedy.

8. That if T. J. Melvin, one of the defendants, did not agree to or place in the hands of Bell any money or notes to be delivered to

the plaintiff, and did not agree that the deed for the premises should be forwarded to him, and did not subsequently ratify such an agreement, he is not bound by it and no recovery can be had against him; and, as this action is founded on an alleged joint liability of all the defendants, there can be no recovery against them or either —.

9. That there being no tender of the deed to Melvin there is no execution of the contract by the plaintiff as to him. He is not liable for the purchase price either individually or jointly with Fuller & Bayne, and the verdict should be for defendants.

10. There is no evidence to submit to the jury that Melvin agreed to make the purchase with Bayne & Fuller or subsequently ratified it or had any knowledge of such an arrangement until the commencement of this suit.

11. If the plaintiff's title was doubtful or was attended with circumstances unknown to defendants at the time of the alleged
26 purchase which would probably involve them in a lawsuit, they were at liberty to rescind.

12. That under the pleadings in the case the plaintiff is bound to show that a good title to the premises was vested in her. Not having so shown, she cannot recover in this suit.

13. That the measure of damages for refusal to execute a parol contract for the sale and purchase of land is the money paid and expense incurred when the action is brought by the vendee and the expense incurred by the vendor when the action is brought by him in the absence of fraud, of which there is no evidence in this case.

R. BROWN,
M. F. ELLIOTT,
T. A. MORRISON,
Att'ys for Def'ts.

Answers to the Defendants' Points.

1st point. This point is affirmed, with this qualification, that if the first deed—the one of Nov. 22, 1883—was accepted by the defendants, and at their request the plaintiffs on Nov. 27, 1883, executed and on Nov. 28, 1883, transmitted to Mr. Bell a second deed, and on Nov. 30, 1883, such second deed was tendered by the plaintiffs to two of the defendants—viz., Mr. Bayne and Mr. Fuller—this was a sufficient execution of the contract notwithstanding the first deed was defective.

2nd point. This point is affirmed, with the qualification expressed in the answer to the first point.

3d point. This point is affirmed, with the explanation that a rescission so effected would leave the defendants liable to an action for damages.

27 4th point. This point is affirmed, with the explanation expressed in the answer to the third point.

5th point. This point is affirmed.

6th point. This point is refused.

7th point. This point is refused.
8th point. This point is affirmed.
9th point. This point is refused.
10th point. This point is refused.
11th point. This point is affirmed.
12th point. This point is refused.
13th point. This point is affirmed.

The court charge the jury, who, being called and in the box, upon their oaths and affirmations aforesaid respectively do say they find for the plaintiff the sum of eleven thousand three hundred dollars; and so they all say.

Before Hon. M. W. Acheson, at chambers.

And now, July 28th, 1886, the defendants move the court for a new trial; and thereupon it is ordered that said motion be entered with the same force and effect as if made in open court, and leave is hereby granted the defendants to file with the clerk reasons in support of said motion within ten days from this date.

July 29th, 1886, defendants' reasons for a new trial filed.

Copy of Reasons for a New Trial.

In the Circuit Court of the United States for the Western District of Pennsylvania.

D. B. WIGGINS & JANE M. WIGGINS, His Wife, in Right of Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, & T. J. MELVIN. } No. 4. July Term, 1885.

28 Now, July 29, 1886, the defendants come into court and file the following reasons for a new trial in this case:

1. The court erred in admitting in evidence the letters of W. W. Bell to the cashier of the Bank of Commerce of Buffalo, New York, bearing date the 24th, 27th, 29th days of November, A. D. 1883, respectively, and also the letter of Hays, cashier, to Bell, bearing date the 23d day of Nov., 1883.

2. The court erred in admitting in evidence the statement signed by W. W. Bell, bearing date November 21, 1883.

3. The court erred in not affirming defendants' first and second points to the court without qualification or modification.

4. The court erred in refusing the defendants' 6th point.

5. The court erred in refusing the defendants' 9th, 10th, & 12th points.

6. The court erred in charging the jury that if they found from the evidence that the defendants accepted the deed of Jane M. Wiggins and D. B. Wiggins, bearing date the 22 day of November, 1883, and requested the plaintiffs to execute the deed of Nov. 26, 1883, for the purpose of perfecting the title, and that deed (the one dated Nov. 26, 1883) was tendered to the defendants on the 30th of Nov. and

refused by them; that the contract was carried out, was relieved from the operation of the statute of frauds, and the plaintiff was entitled to recover the purchase-money agreed to be paid by the terms of the parol contract.

7. The court erred in not charging the jury more specific-
29 ally as to what constituted an acceptance of the deeds.

8. The court erred in not charging the jury that the mere retention of the deed dated the 22d day of November, 1883, by W. W. Bell did not constitute an acceptance of the same by the defendants.

9. The court erred in not charging the jury that there was no evidence of the acceptance of the deed of Nov. 22, 1883, by the defendants.

10. The court erred in not charging the jury that all the evidence upon the subject showed that the defendants repudiated the deed of Nov. 22, 1883, and refused to accept the same, and required the plaintiffs to execute a new deed before they would carry out the parol agreement.

11. The court erred in not charging the jury that there was no evidence showing that the defendants accepted either the deed of Nov. 22 or Nov. 26, 1883, and that the plaintiffs could not recover the purchase-money agreed to be paid by the parol agreement.

12. The verdict is against the weight of evidence.

R. BROWN.
T. A. MORRISON.
M. F. ELLIOTT.

30 *Opinion of the Court and Order Overruling Motion.*

B. B. WIGGINNS *et ux.* } No. 4. July Term, 1885. (Erie Docket.)
vs.
BAYNE *et al.*

Surmotion *ex parte* defendants for a new trial.

November 4th, 1886.—Argued *coram* McKennan and Acheson, JJ. *C. a. v.*

November 23d, 1886.—*Per curiam:*

1. Both the judges concur in the opinion that under the evidence the answers to the defendants' 1st and 2d points were correct, and that the question of the acceptance of the defective deed was rightfully submitted to the jury.

2. We think, too, there was evidence for the jury tending to show that Mr. Melvin had either authorized the contract or ratified it.

3. We also think the letters which the court admitted were properly received in evidence. Those letters, indeed, were part of the transaction, and they explained the conduct of the parties. Besides, Mr. Bell stood in such a relation to the defendants as to make his letters admissible.

The motion for a new trial must be overruled, and it is so ordered.

Filed Nov'r 23, 1886.

Nov. 23, 1886.—Order overruling motion for new trial filed at Pittsburgh.

And now, Nov. 26, 1886, in pursuance of the above verdict and of the authority in me vested, I hereby enter judgment in favor of the plaintiffs and against the defendants for the sum of eleven thousand three hundred dollars and costs of suit.

H. D. GAMBLE, *Clerk*,
Per F. W. GRANT, *Dep.*

31 Debt, $11,300.00.
Interest July 28th, 1886.

December 2, 1886.—Defendants' attorneys file a præcipe for a writ of error to the Supreme Court of the United States.

Same day.—Bond for supersedeas in sum of $25,000.00, with C. H. Foster and F. W. Davis as sureties in like sum taken.

Dec. 3, 1886.—Writ of error allowed, bond upon writ of error approved, and citation awarded.

Dec. 23, 1886.—Messrs. Davenport & Griffith, att'ys for plaintiff, accept service of citation.

And now, Sep. 23, 1887, motion on the part of the def'ts for an order to have the papers, letters, contracts, and deeds introduced in evidence on the trial of this cause and a copy of the reporter's notes of testimony taken at the time of the trial thereof attached to the record and transmitted therewith to the Supreme Court of the United States.

Same day.—"Motion allowed, and it is so ordered." "By the court."

September 26th, 1887.—Record transmitted to clerk of the United States Supreme Court.

32 In the Circuit Court of the United States for the Western District of Pennsylvania.

D. B. WIGGINS & JANE M. WIGGINS, His Wife, in the Right of Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, and THOMAS J. MELVIN.

No. 4. July Term, 1885.
Trial at Erie, Pa.

Bill of Exceptions on Part of Plaintiffs in Error.

Upon the trial of the issue in this case the plaintiffs offered in evidence a certain instrument in writing in words and figures as follows, to wit:

"BRADFORD, PENN'A, *Nov.* 21*st*, 1883.

Received $4,750 from Bayne, Fuller, and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000, the balance to be paid in notes and money, as agreed on by both parties. I am to remit this money and the notes

spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 at three months, $2,500 at six months, both with interest.

(Signed) W. W. BELL, *Cashier.*"

To the foregoing offer defendants objected in words as follows, to wit:

"Objected to as incompetent and irrelevant under the pleadings in this case."

And further objected to by defendants as follows, to wit:

"Objected to as irrelevant and immaterial; also that all the defendants were not present at the time it was executed."

The court overruled the objections and admitted the paper in evidence in words as follows, to wit:

"This is a part of the transaction, and two of the defendants, at any rate, were connected directly with it, and it seems to me that it is admissible in evidence. What the effect of it may be we will see further on."

To which decision of the court the defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

M. W. ACHESON.

33 Upon the trial of the issue in this cause the plaintiffs offered in evidence a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 27, 1883.

"E. W. Hayes, Esq., Cas.

"DEAR SIR: I enclose a deed that Bayne, Fuller & Melvin's att'y wishes executed in place of the one sent by you, on receipt of which I will forward money, notes, and old deed.

"Yours truly, W. W. BELL, *Cas.*

"This is a Pa. form and the other is a N. Y. one."

And at the same time, and in connection with above-mentioned letter, the plaintiffs also offered in evidence another letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 29, 1883.

"E. W. Hayes, Esq., Cas.

"DEAR SIR: By request of Bayne, Fuller & Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins giving the reasons for so doing.

"Yours truly, W. W. BELL, *Cas.*"

34 And at the same time, and in connection with the two letters last above mentioned, the plaintiffs also offered another letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 24, 1883.

"E. W. Hayes, Cas.

"DEAR SIR: Yours of 23d inst. at hand. The search is taking longer than expected, but will probably be completed by Monday.

"Yours truly, W. W. BELL, *Cas.*"

being the three letters identified by the witness, W. W. Bell.

To the foregoing offers of the three letters above described defendants objected in words following, to wit:

"Objected to as being simply a declaration of Mr. Bell and not binding or affecting the defendants in any way."

Defendants further objected to said offers in words following, to wit:

"Def'ts' counsel object to all the letters as incompetent against the defendants; that they are at most but declarations of this witness."

The court overruled the objections and admitted the letters in evidence.

The court used the following words in making above ruling, to wit:

"I do not see that he says anything in this correspondence that is against the defendants—anything more than he explains the transactions as they occur. I think that is about all there is of it. One of the letters, I understand the witness to say, was written at the request of the defendants. I think I will receive these letters."

35 To which decision of the court in overruling said objections and admitting in evidence said letters defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

M. W. ACHESON.

Upon the trial of the issue in this cause the plaintiffs offered in evidence a certain instrument in writing, purporting to be a letter from E. W. Hayes, dated November 23rd, 1883, addressed to W. W. Bell, in words and figures following, to wit:

"BUFFALO, 11, 23, 1883.

"W. W. Bell, Esq., cashier, Bradford.

"SIR: I enclose for collection and remittance deed of J. M. and D. B. Wiggins, for which please remit us your draft on N. Y., 4,750, & two notes given by Bayne, Fuller & Melvin, 2,500 each, at 3 & 6 months, with interest, to order D. B. Wiggins.

"Yours truly, E. W. HAYES, C."

To the foregoing offer defendants objected in words following, to wit:

"Objected to as incompetent for any purpose in this case."

And further objected to by defendants in words following, to wit:

"Objected to as incompetent and inadmissible."

The court overruled the objection and admitted the letter in evidence.

To which decision of the court in overruling said objections and admitting in evidence said letters the defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

M. W. ACHESON.

36 Upon the trial of the issue in this cause, after the testimony was concluded, the defendants presented to the court the following points, herein set forth at length, with the answer of the court thereto.

1.

The defendants' counsel respectfully ask the court to charge the jury that "the contract for the sale of the premises described in the plaintiffs' declaration being in parol and there being no evidence that any possession thereof was taken by the defendants under and pursuant to the contract, there can be no recovery of the purchase price by the vendor unless the contract was fully executed by the delivery of a good and indefeasible deed for the land accepted by the vendees."

To the foregoing point the court answered as follows, to wit:

"The answer of the court to that point is this: This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective."

To which answer of the court defendants excepted and prayed the court to seal this bill of exceptions, which were taken before verdict, and the bill is accordingly sealed.

M. W. ACHESON.

2.

37 Upon the trial of the issue in this cause, after evidence was closed the defendant submitted to the court the following point and asked the court to charge the jury as follows:

"2nd. That until such delivery and acceptance the arrangement rested entirely in parol, and was ineffectual to pass the title to the land to the vendees and render them liable to the vendor for the purchase-money by reason of the statute of frauds and perjuries."

Which point was answered by the court in words as follows:

"This point is affirmed, with the qualification expressed in the answer to the first point, and that I will again read you:

"This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defendants, viz., Mr. Bayne and

Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective.

"The first deed was undoubtedly defective and very seriously so. Notwithstanding, if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiffs to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

To which answer of the court to the foregoing point the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

38 Upon the trial of the issue in this cause, after conclusion of the evidence, the defendauts submitted to the court the following point and asked the court to charge the jury as follows:

"3rd. If the defendants agreed in parol that the money and notes which were to be the consideration of the purchase should be delivered by Bell to the plaintiff on receipt of the deed from her the defendants had the right to rescind the agreement at any time before the receipt by Bell of such deed and the delivery of the money and notes to her." The court answered said point in the words following, to wit:

"This point is affirmed with the explanation that a rescission so effected would leave the defendants liable to an action for damages—that is to say, this contract being a parol contract at any time before it was consummated the defendants had a right to notify Bell neither to accept the deed nor to transmit the money and notes, subject to their liability to an action for damages, such damages as the plaintiff might sustain."

To which answer of the court to the foregoing point defendants excepted before verdict and prayed the court to seal this their bill of exceptions, which is accordingly done.

Upon the trial of the issue in this cause the defendants, after the evidence was closed, submitted the following point to the court and asked the court to charge the jury as follows:

"4th. If no notes or money were placed in the hands of Bell at the time of or subsequent to the alleged agreement by Fuller and Bayne that the deed should be forwarded to him, Bell, and the money and notes be delivered to the plaintiff in payment of the consideration and it was so known and understood by Wiggins, then there was nothing done by Bayne and Fuller towards an ex-
39 ecution of the contract on their part, and they had a right and were at liberty to rescind it by notice to Bell not to receive the deed."

The court answered the foregoing point in the words following, to wit:

"This point is affirmed, with the explanation I have already given, that it would leave them open to an action for damages."

To the foregoing answer of the court to defendants' fourth point

the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

Upon the trial of the issue in this cause, after the evidence was closed, defendants submitted to the court the following point and requested the court to charge the jury as follows, to wit:

"6th. If Wiggins agreed with Bayne and Fuller to convey to the defendants land the title to which was in his wife without disclosing her ownership, they had a right to refuse to execute the contract on that account when they learned that fact."

Which point and request of defendants the court refused in the words following, to wit:

"This point is refused."

To which answer of the court the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

40 Upon the trial of the issue in this cause the defendants, after the evidence had closed, submitted to the court the following point and asked the court to charge the jury in words as follows, to wit:

"9th. There being no tender of the deed to Melvin, then there is no execution of this contract by the plaintiff as to him. He is not liable for the purchase price, either individually or jointly with Fuller and Bayne, and the verdict should be for the defendants."

The court answered the foregoing ninth point of defendants in words as follows, to wit:

"This point is refused. If Mr. Melvin subsequently acquiesced in or ratified this contract, of which there is some evidence, in my judgment, a tender to him individually was not necessary. When I say 'some evidence, in my judgment,' I mean some evidence to go to the jury. I do not mean to intimate any opinion on the effect of that evidence."

To which answer of the court to the foregoing point defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the court the following point and asked the court to charge the jury as follows, to wit:

"10th. There is no evidence to submit to the jury that Melvin agreed to make the purchase with Bayne and Fuller or subsequently ratified it or had any knowledge of such an arrangement before the commencement of this suit."

The court refused the foregoing tenth point of defendants in words as follows, to wit:

"This point is refused. That is not my recollection of the
41 evidence, but what the testimony is upon that point is exclusively for you. All that I say is that it is for you to decide that and not the court, and I therefore decline the point."

To which answer by the court of defendants' tenth point defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the court and asked the court to charge the jury as follows:

"12th. That under the pleadings in the case the plaintiff is bound to show a good title to the premises as vested in her, and not having so shown she cannot recover in this case."

The court answered and refused the foregoing twelfth point of defendants in words as follows:

"This point is refused."

The counsel for defendants excepted to the foregoing answer to defendants' twelfth point before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

Upon the trial of the issue in this cause the court, in charging the jury, said to them as follows in answering defendants' second point:

"That if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs, on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defend-
42 ants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract. Notwithstanding the first deed was defective—the first deed was undoubtedly defective, and very seriously so—notwithstanding if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiff to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

The defendants excepted to that part of the charge of the court before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

M. W. ACHESON.

In the trial of the issue in this cause the court failed to properly instruct the jury what would be an acceptance of the deed or deeds by the defendants, and the defendants excepted to the charge before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

The foregoing bill of exceptions served on us Sep. 22, 1887.

DAVENPORT & GRIFFITH,
Att'ys for Def'ts in Error, Erie, Pa.

43 *Copy of Bond for Supersedeas.*

In the Circuit Court of the United States for the Western District of Pennsylvania, at Erie.

B. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins, Citizens of the State of New York,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. Melvin, Citizens of the State of Pennsylvania.
} No. 4. July Term, 1885.

Know all men by these presents that we, S. G. Bayne, J. M. Fuller, T. J. Melvin, C. H. Foster, and F. W. Davis, all of the county of McKean and State of Pennsylvania, are held and firmly bound unto the above-named Jane M. Wiggins in the sum of twenty-five thousand dollars, to be paid to the said Jane M. Wiggins; for the payment of which, well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the second day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-named S. G. Bayne, J. M. Fuller, and T. J. Melvin have prosecuted their writ of error to the Supreme Court of the United States, at the city of Washington, District of Columbia, to reverse the judgment rendered in the above suit by the circuit court of the United States for the western district of Pennsylvania, at Erie:

Now, therefore, the condition of this obligation is such that if the above-named S. G. Bayne, J. M. Fuller, and T. J. Melvin shall prosecute their writ of error to effect and answer all damages and
44 costs if they fail to make their writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. G. BAYNE. [SEAL.]
J. M. FULLER. [SEAL.]
T. J. MELVIN. [SEAL.]
C. H. FOSTER. [SEAL.]
F. W. DAVIS. [SEAL.]

Sealed and delivered and taken and acknowledged this second day of December, 1886, before me—

F. W. GRANT,
U. S. Commissioner, Western District of Pa., at Erie.

UNITED STATES OF AMERICA, *Western District of Penna.*, } *ss:*

C. H. Foster and F. W. Davis, being duly sworn, depose and say

and each for himself saith that he is worth the sum of twenty-five thousand dollars over and above all his just debts and liabilities.

C. H. FOSTER.
F. W. DAVIS.

Sworn to and subscribed before me this second day of December, A. D. 1886.

F. W. GRANT,
U. S. Commissioner, Western District Pa.

I approve the above bond and the sufficiency of the sureties thereto.

M. W. ACHESON, *U. S. Judge.*

Endorsed: No. 4. July term, 1885. D. B. Wiggins *et al. vs.* S. G. Bayne *et al.* Bond for supersedeas. Filed Dec. 2, 1886. F. W. Grant, deputy clerk.

45 *Order for Transmission of Certain Papers.*

Circuit Court of the United States, Western District of Pennsylvania. July Term, 1885.

D. B. Wiggins *et ux.*
vs.
S. G. Bayne *et al.* } No. 4.

Motion.

And now, to wit, Sept. 23d, 1887, motion — on the part of the defendants in this case for an order to have the papers, letters, contracts, and deeds introduced in evidence on the trial of this cause and a copy of the reporter's notes of testimony taken at the time of the trial thereof attached to the record and transmitted therewith to the Supreme Court of the United States.

M. F. ELLIOTT,
T. A. MORRISON,
BROWN & STONE,
Att'ys for Defendants.

Sept. 23d, 1887.—Motion allowed, and it is so ordered by the court.

46 United States of America, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, citizens of the State of New York, pl'ff-, and S. G. Bayne, J. M. Fuller, and T. J. Melvin, citizens of Pennsylvania, def'ts, a manifest error hath happened, to the great

damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3rd day of December, A. D 1886.

Seal of the U. S. Circuit Court, W. D. Penna.

H. D. GAMBLE,
Clerk U. S. Cir. Court.

Allowed by—
M. W. ACHESON, *U. S. Judge.*

[Endorsed:] No. 4. July term, 1885. D. B. Wiggins *et al. vs.* S. G. Bayne *et al.* Writ of error. Filed Dec. 3, 1886.

46½ UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *sct:*

To D. B. Wiggins and Jane M. Wiggins, his wife, in right of said Jane M. Wiggins, citizens of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein S. G. Bayne, J. M. Fuller, and T. J. Melvin, citizens of the State of Pennsylvania, — plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this third day of December, A. D. 1886.

M. W. ACHESON,
Judge of U. S. Circuit Court.

This served on us Dec. 23d, 1886, at Erie, Pa.

DAVENPORT & GRIFFITH,
Att'ys for Def'ts in Error.

[Endorsed:] No. 4. July term, 1885. D. B. Wiggins *et al. vs.* S. G. Bayne *et al.* Citation.

47 In the Circuit Court of the United States for the Western District of Pennsylvania.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of said Jane M. Wiggins, Citizens of the State of New York,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. Melvin, Citizens of the State of Pennsylvania.
} No. 4. July Term, 1885, at Erie.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing papers contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

Seal of the U. S. Circuit Court, W. D. Penna., Erie.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Erie, this 26th day of September, A. D. 1887.

H. D. GAMBLE, *Clerk,*
Per F. W. GRANT, *Deputy.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, judge of the United States district court for said district, presiding in the U. S. circuit court, do hereby certify that H. D. Gamble, above named, was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Presiding U. S. Circuit Court.

Erie, Sep. 26th, 1887.

48 2470.

S. G. Bayne, president. J. M. Fuller, vice-president.
(T. Melvin) W. W. Bell, cashier.

First National Bank of Bradford.

BRADFORD, PA., *Nov'r 21st*, 1883.

Received $4,750 from Bayne, Fuller & Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000; the balance to be paid in notes and money as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 @ 3 mos. and $2,500 @ 6 mos., both with interest.

W. W. BELL, *Cas.*

[Endorsed:] Wm. Bell. Receipts. Nov. 21, '83.

49 Bank [torn] in Buffalo.

Thos. Thornton, pres't. H. G. Nolton, vice-pres't.
E. W. Hayes, cashier.

BUFFALO, 11, 23, 1883.

W. W. Bell, Esq., cashier, Bradford.

SIR: I enclose for collection and remittance deed of J. M. & D. B. Wiggins, for which please remit us your draft on N. Y.,* 4,750 & two notes given by Bayne, Fuller & Melvin, 2,500 each, at 3 & 6 months, with interest, to order D. B. Wiggins.

Yours truly, E. W. HAYES, *C.*

* We presume the remittance will be at par.

[Endorsed:] B'k Commerce. Nov. 23, '83.

50 2470.

S. G. Bayne, president. J. M. Fuller, vice-president.
W. W. Bell, cashier.

First National Bank of Bradford.

BRADFORD, PA., 11, 24, 1883.

E. W. Hayes, cas.

DEAR SIR: Yours of 23 inst. at hand. The search is taking longer than expected, but will probably be completed by Monday.

Yours truly, W. W. BELL, *Cas.*

[Endorsed:] Wm. Bell. Letters. Nov. 24, '83.

51 2470.

S. G. Bayne, president. J. M. Fuller, vice-president.
W. W. Bell, cashier.

First National Bank of Bradford.

BRADFORD, PA., 11, 27, 1883.

E. W. Hayes, Esq., cas.

DEAR SIR: I enclose a deed that Bayne, Fuller & Melvin's att'y wishes executed in place of the one sent by you, on receipt of which I will forward money, notes, and old deed.

Yours truly, W. W. BELL, *Cas.*

This is a Pa. form and the other is a N. Y. one.

[Endorsed:] Wm. Bell. Nov. 27, '83.

52 2470.

S. G. Bayne, president. J. M. Fuller, vice-president.
W. W. Bell, cashier.

First National Bank of Bradford.

BRADFORD, PA., 11, 29, 1883.

E. W. Hayes, Esq., cas.

DEAR SIR: By request of Bayne, Fuller & Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins, giving the reasons for so doing.

Yours truly, W. W. BELL, *Cas.*

[Endorsed:] Wm. Bell. Letters. Nov. 29, '83.

53 *Warranty Deed.* (18.)

Young, Lockwood & Co., printers and stationers, 209 Main street, Buffalo.

This indenture, made the twenty-second day of November, in the year of our Lord one thousand eight hundred and eighty-three, between Jane M. Wiggins, of the town of West Seneca, in the county of Erie and State of New York, of the first part, and S. G. Bayne, J. M. Fuller, and T. J. Melvin, of the city — Bradford, in the State of Pennsylvania, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents does grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part and to their heirs and assigns forever all that certain piece or parcel of land situate in the township of Fayette, in the county of McKean, in the State of Pennsylvania, bounded and described as follows, viz: Beginning at a beech, northwest corner of lot No. forty-four of the allottment of the lands of the State in said township, thence north by unseated lands twenty-eight perches and three-tenths of a perch to a post; thence by unseated lands south eighty-nine and two-thirds degrees west one hundred and eleven perches and seven-tenths of a perch to a post; thence by unseated land south forty and one-tenth perches to a post, west fifty perches to a post; thence by unseated lands south seventeen and three-sixths degrees east one hundred and twenty-six and five-tenths perches to a beech; thence by unseated lands south eighty-nine and one-fourth degrees east one hundred and fifty-nine and two-tenths perches to a post; thence north by west line of lot No. forty-four one hundred forty-one and four-tenths perches to the place of beginning, containing one hundred and forty-seven and three-tenths acres, be the same more or less, excepting and reserving from the north part

thereof seventy-five acres heretofore conveyed to Timothy Mullen by the party of the first part, the said land not hereinbefore excepted and hereby conveyed being seventy acres of land, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, dower and right of dower, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the said hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part and to their heirs and assigns forever; and the said Jane M. Wiggins, for herself, her heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, their heirs and assigns, that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, their heirs or assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof she will forever warrant and defend.

In witness whereof the party of the first part has hereunto set her hand and seal the day and year first above written.

JANE M. WIGGINS. [SEAL.]
D. B. WIGGINS.

Signed, sealed, and delivered in presence of—

—— ——.

54 STATE OF NEW YORK, }
—— *County*, } *ss:*

On this — day of ——, 188–, before me, the subscriber, appeared —— ——, who acknowledged that he executed the within instrument; and I certify that I know the person who made the said acknowledgment to be the individual described in and who executed the within instrument; that at the time of the execution of this acknowledgment he was —.

(Married or single, as the case may be.)

—— ——.

STATE OF NEW YORK, }
Erie County, } *ss:*

On this twenty-third day of November, 1883, before me, the subscriber, appeared Dennis B. Wiggins and Jane M. Wiggins, his wife, and severally acknowledged that they had executed the within instrument; and the said Jane M. Wiggins, on a private examination apart from her husband, acknowledged that she executed the within instrument freely and without any fear or compulsion of her husband; and I further certify that I know the persons who made the said acknowledgment to be the individuals described in and who executed the within instrument.

STEPHEN LOCKWOOD,
Notary Public in and for Erie County, New York.

STATE OF NEW YORK, } ss:
Erie County, Clerk's Office, }

I, Joseph E. Ewell, clerk of said county and of the courts thereof, the same being courts of record, do hereby certify that Stephen Lockwood, whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment a notary public in and for the said county, duly commissioned, sworn, and authorized to take the same; and, further, that I am well acquainted with his handwriting and verily believe that the signature to the said proof or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

Seal Clerk's Office for the County of Erie, N. Y.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 23rd day of November, A. D. 1883.

CHAS. H. AVERY, *D'y Clerk.*

[Endorsed:] 535. Dated Nov. 22d, '83. E'cut. Nov. 23d, '83. Warranty deed from —— —— to —— ——. Dated the — day of ——, 188–. Recorded in the clerk's office of the county of —— in Liber —, page —, the — day of ——, 188–, at — o'clock — m., and examined. —— ——, clerk.

55 Entered according to act of Congress in the year 1873 by F. Schœning & Co. in the office of the librarian of Congress, at Washington.

No. 100. *Deed, Warranty.*

Fred. Schœning & Co.'s uniform series of law blanks.

This indenture, made the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and eighty-three, between Jane M. Wiggins, of the town of West Seneca, county of Erie, and State of New York, and D. B. Wiggins, her husband, of the same place, of the first part, and S. G. Bayne, J. M. Fuller, and T. J. Melvin, of the city of Bradford, McKean county, State of Pennsylvania, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, unto them well and truly paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, their heirs and assigns, all that certain piece or parcel of land situate in La Fayette township, McKean county, Pennsylvania, bounded and described as follows, viz: Beginning at a beech tree, the northwest corner of lot No. 44 of

the Fox estate, in said La Fayette township, McKean county, Penn'a, thence north by unseated land 28 perches and $\frac{3}{10}$ of a perch to a post; thence by unseated land south $89\frac{2}{3}°$ west $111\frac{7}{10}$ perches to a post; thence by unseated land south $40\frac{1}{10}$ perches to a post, west 50 perches to a post; thence by unseated land south $17\frac{3}{6}°$ east $126\frac{5}{10}$ perches to beech; thence by unseated land south $89\frac{1}{4}°$ east $159\frac{2}{10}$ perches to post; thence north by the west line of lot 44 one hundred forty-one and $\frac{4}{10}$ perches to the place of beginning, containing $147\frac{3}{10}$ acres, with the usual allowance of 6% for roads, the same being part of warrants No-. 3432 and 3433, excepting and reserving therefrom and thereout all that part and portion thereof heretofore conveyed by said first party and her husband by deed dated December 25, A. D. 1882, to Timothy Mullin, Jr., and recorded in the office of the recorder of deeds of McKean county in Deed Book No. 19, at page 62, bounded and described as follows, viz: All that certain piece or parcel of land situate in La Fayette township, McKean county, Penn'a, beginning at a post, the northeast corner of the Wiggins lot, thence along the east line of said lot south 1° 30′ east 86.15 rods to a post; thence south 88° 15′ west 163.45 rods to a post in the west line of said lot; thence along said west line north 1° 45 west 44.9 rods to the west northwest corner of said lot; thence along the lot line north 88° 15′ east 50.7 rods to a post; thence along lot line north 1° 45′ west 41 rods to the northwest corner of said lot; thence along the north line of said lot north 88° east 43.4 rods to a post, and thence, continuing on said north line north 88° 15′ east 69.7 rods, to the place of beginning, containing 75 acres, more or less, being part of lot 46 and part of warrants 3432 and 3433, the part of said land hereby conveyed containing seventy (70) acres or more—

56 Together with all and singular the tenements, hereditaments, and appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate right, title, interest, property, claim, and demand whatsoever, both in law and equity, of the said party of the first part of, in, to, or out of the said premises and every part and parcel thereof:

To have and to hold the said premises, with all and singular the appurtenances, unto the said parties of the second part, their heirs and assigns, to and for the only proper use and behoof of the said parties of the second part, their heirs and assigns forever.

And the said Jane Wiggins and D. B. Wiggins, their heirs, executors, and administrators, do by these presents covenant, grant, and agree to and with the said parties of the second part, their heirs and assigns, that they, the said Jane Wiggins and D. B. Wiggins, their heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended so to be, with the appurtenances, unto the said parties of the second part, their heirs and assigns, against the said party of the first part and their heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will by these presents warrant and forever defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JANE M. WIGGINS. [SEAL.]
DENNIS B. WIGGINS. [SEAL.]

Signed, sealed, and delivered in the presence of—the word north interlined in 19th line of 2nd page before signing—

—— ——.

STATE OF NEW YORK, }
County of Erie, } *ss:*

Be it remembered that on this 27th day of November, in the year one thousand eight hundred and eighty-three, before me, a notary public in and for said county, personally appeared Jane Wiggins and D. B. Wiggins, her husband, who I am satisfied are the individuals named in and who executed the above deed or conveyance, and, I having first made known to them the contents thereof, they acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed; and the said Jane Wiggins, being of full age, on a private examination apart from her said husband by me thereon privately examined and the full contents of the above deed being by me first made fully known unto her, did thereupon declare and say that she signed, sealed, and delivered the same as her voluntary act and deed freely and without any coercion or compulsion on the part of her said husband.

Witness my hand and notarial seal.

[Seal George A. Davis, Notary Public, Erie Co., N. Y.]

GEORGE A. DAVIS, [L. S.]
Notary Public, Erie Co., N. Y.

STATE OF NEW YORK, }
Erie County, Clerk's Office, } *ss:*

I, Joseph E. Ewell, clerk of said county and of the courts thereof, the same being courts of record, do hereby certify that George A. Davis, whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment a notary public in and for the said county, duly commissioned, sworn, and authorized to take the same; and, further, that I am well acquainted with his handwriting and verily believe that the signature to the said proof or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

Seal Clerk's Office for the County of Erie, N. Y.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 28 day of November, A. D. 1883.

J. E. EWELL, *Clerk.*

57 [Endorsed:] Dated Nov. 26, '86. E'cut. Nov. 28, '86. No. —. Deed. Jane Wiggins and D. B. Wiggins, her husband,

to S. G. Bayne, J. M. Fuller, and T. J. Melvin. Warranty. Dated ——. For —— ——. Consideration, ——. Recorded ——. Entered for record in recorder's office of —— county the — day of ——, 18—. —— ——, recorder. Tax, $—. Fee, $—.

COMMONWEALTH OF PENNSYLVANIA, } ss:
—— *County*, }

Recorded on this — day of ——, A. D. 18—, in the recorder's office of said county in Deed Book, vol. —, page —.

Given under my hand and the seal of the said office the date above written.

—— ——, *Recorder.*

58 Circuit Court of the United States, Western District of Pennsylvania.

D. B. WIGGINS and JANE M. WIGGINS, His Wife, in Right of the said Jane M. Wiggins,
vs.
S. G. BAYNE, J. M. FULLER, and T. J. MELVIN. } 4. July Term, 1885.

Tried before Hon. M. W. Acheson and a jury at Erie, Pa., July 27th, 1886.

Messrs. Davenport and Griffith and James George, Esq., appearing for the plaintiffs.

Hons. R. Brown and M. F. Elliott and T. A. Morrison, Esq., appearing for the defendants.

Pl'ffs' counsel ask leave to file another count to their declaration, making an additional count; allowed, with the privilege to the defendants of filing a replication to it during the trial, if desired.

59 Dr. D. B. WIGGINS, sworn and examined by Mr. DAVENPORT, testified:

Q. Dr. Wiggins, whereabouts do you reside?

A. In West Seneca, a short distance outside of the city of Buffalo.

Q. I wish you to state what, if any, property your wife owns a short ways from Bradford—16 or 17 miles from Bradford.

Objected to as incompetent to prove title.

Pl'ffs' counsel first offers in evidence deed from the sheriff of McKean county to Jane M. Wiggins.

Objected to as incompetent, standing by itself.

Offered for the purpose of showing title to this property for the recovery of the purchase-money of which this suit is brought.

The COURT: As one step in that direction I suppose it is competent. The order of proof is not a matter that the court would control unless there was some reason for it. I understand the counsel that they will follow it by other evidence.

Mr. DAVENPORT: Certainly. We propose to follow it up and

show that being not satisfied with the acknowledgement of
60 this deed sent to the defendants by Mr. and Mrs. Wiggins
that they themselves prepared a second deed with an acknowledgment, which they said was in accordance with the Pennsylvania statute, which was sent to Dr. Wiggins and wife and by them signed, and then this deed was returned to them.

The COURT: Then the offer is to show that a deed from the plaintiffs was accepted by the defendants?

Mr. DAVENPORT: That is it.

Mr. ELLIOTT: It is a part of our defense that the plaintiffs did not have title. It is alleged in the *narr.* in this case that they were seized in fee of this property which they undertook to convey to the defendants. Now we say that they are compelled to show title, not merely that they were purchasers of the sheriff's deed and offered us such title as they had, but that it was a good title, and they cannot begin in the middle of the title for the purpose of showing that.

The COURT: As I understand the plaintiffs' opening and offer it is alleged that this was a consummated transaction. I do not see
that it is objectionable to give in evidence that sheriff's deed
61 as identifying the property, and, in connection with other evidence indicated by the counsel's opening, it is not an action on an executory contract, as I regard it. This amended count is on an executed contract. I don't see any objection to offering the deed.

Pl'ffs' counsel renews his offer to put in evidence deed from Chester S. King, high sheriff of McKean county, to Jane M. Wiggins for the property for the recovery of the purchase-money of which this suit is brought, dated February 26th, 1878.

Objected to, as before, as irrelevant and incompetent, and objection overruled, deed received in evidence, and exception by def'ts' counsel.

Deed being recorded in the prothonotary's office of McKean county February 27th, 1878, and in the recorder's office April 12th, 1883, in Deed Book, volume 19, page 95.

Mr. DAVENPORT, resuming with the witness:

Q. You say that you resided in Buffalo and that your wife owned this property?

A. Yes, sir.

Q. Where did you go for the purpose of selling this property? Come right down to the date of the contract.

62 A. I went to Bradford.

Q. When at Bradford who did you see?

A. The first person I saw on the 20th of November, 1883—about the first person I called on—was my attorney, Mr. George, for the purpose of inquiring as to the financial responsibility of one of the parties that I had been conversing with in reference to the sale of the land.

Q. To whom did he refer you for the purpose of making these inquiries?

Objected to as immaterial; offered for the purpose of showing how he came to see Bayne, Fuller, and Melvin.

A. I asked him if this man was responsible, and he said he thought he was.

The COURT: That is not material.

Mr. DAVENPORT, resuming:

Q. What, if any, conversation did you have with these defendants on the 20th of November, 1883?

A. I went into Mr. Fuller's office to ask him—I was acquainted with Mr. Fuller—as to the responsibility of this man.

63 Q. Give us the name.

A. T. N. Barnsdell.

Q. What did he say to you?

A. He said he thought he was responsible.

Q. Then what, if anything, did he say about buying this land himself?

A. I said to Mr. Fuller that Mr. Barnsdell wanted to buy it, but that he wanted time on it—I think it was four, eight, and twelve months—but that I had had a good deal of trouble with the man that I sold the north half to in getting my pay—a good deal of expense—and that I had much rather sell it for cash. Mr. Fuller replied that they had thought about writing me in reference to this land; that they were operating largely in that vicinity, and they had thought about writing me in reference to buying it.

Q. Go on.

A. Mr. Barnsdell had offered me——

Objected to.

Q. State the conversation with Mr. Fuller.

A. I said to him that he could have it at $140 an acre; that I had been offered $150, but that I would take ten dollars an acre less for cash. He said, "I will step out and see my pard." I suppose he meant his partner. He went out and was gone ten or fifteen

64 minutes and came back and said they had made up their minds to offer me $10,000 for that lot. I said to him that I had promised to let two other parties know before I sold. I asked him if he would hold that offer open until that evening or the next morning, until I could communicate with those parties. He said that they kept open until eight o'clock, and if I came and he was not there that he had a telephone in his house, and that I could communicate with him there, and he would come up and consummate the trade. I saw those parties—one of them, Mr. Barnsdell—with whom I had agreed to communicate before I sold positively. He was in Philadelphia.

Q. How did you learn that?

A. From his partner or man in the office.

Q. Where?

A. At Bradford.

Q. Why don't you tell us what you did after leaving Fuller's office?

Objected to, to what he did in the absence of Fuller.

A. I didn't see Mr. Barnsdell; he was in Philadelphia. I saw Mr. Thayer.

Q. After having seen Mr. Thayer what did you do?

65 A. I went back to the office and it was closed. The next morning I went to the office, and Mr. Bayne and Fuller were both there. We had some considerable conversation as to the number of acres of land. Mr. Bayne insisted on my guaranteeing a certain number of acres, and I proposed to have it surveyed. But at all events we settled down upon 70 acres, and he then stepped to his desk and wrote out a certificate of deposit, as I called it, to the First National Bank or the cashier of the First National Bank.

Q. Who was that?

A. Mr. Bell. Stating——

Objected to, that it was in writing.

Pl'ffs' counsel asks the defendants to produce the paper, being a receipt for $250.

Mr. ELLIOTT: We have had no notice to produce it, and we haven't it so far as I know.

Pl'ffs' counsel reads the notice calling for the production of the receipt of $250 signed by Wiggins on land contract, and also to produce certain letters, etc.

Def'ts' counsel deny service of the subpœna and state that it has never been read to them.

66 J. M. FULLER sworn to make true answer, and examined by Mr. DAVENPORT:

Q. Were you served by J. S. Barlow, constable, with this subpœna?

Subpœna shown witness.

A. I haven't any recollection of it. The only recollection of having any subpœna served on me was by Weaver, constable.

Q. Have you any recollection of that subpœna having been served on you?

A. I cannot tell you that.

Q. Then you say you have no recollection of that subpœna having been served on you?

A. I cannot recognize that paper.

Q. Have you any recollection of that paper having been served on you?

A. That is all I can answer.

Q. I ask you to answer yes or no. I ask if you have any recollection of that subpœna having been served on you?

A. I have not.

Q. Has there been any subpœna served on you by Mr. Barlow?

A. I don't recollect that he did. I recollect a constable named Weaver did.

67 Q. Did Mr. Barlow serve any on the 19th of July of this year?

A. I have no recollection of it.

Q. What notice did you ever get in any way that you were required to produce the receipt which you took from Mr. Wiggins for $250?

A. I don't know that I ever had any notice.

By Mr. ELLIOTT:

Q. Have you any recollection of having any notice?

A. Not the slightest.

S. G. BAYNE sworn, and examined by Mr. DAVENPORT:

Q. Was this subpœna served on you by Mr. Barlow?

A. I don't believe it was.

Q. Was it served on you? I don't ask what you believe; I ask the fact. Was that subpœna served on you?

A. I cannot answer that yes or no. Mr. Barlow gave me a paper, which had the appearance of being larger than that, and
68 said in effect that I was wanted in Erie at this date, and I never saw that paper to my recollection before, and I think it was twice the size of that paper that he read to me. He just summoned me here to this court and said nothing of any receipt.

Q. He gave you no notice to produce the receipt?

A. None whatever.

T. J. MELVIN sworn to make true answer, and examined by DAVENPORT:

Subpœna shown witness.

Q. Was this subpœna served on you?

A. I couldn't tell.

Q. Was any subpœna?

A. Yes, sir. Mr. Barlow or Mr. Weaver, I don't know which, met me on the street one day in Bradford and said that he had a subpœna for me to appear in Erie, and he didn't read it and I didn't take it in my hands that I remember of.

Q. Did he say anything about your producing a receipt for $250?

A. No, sir; he merely said that he had a subpœna to go to Erie on the 19th, and that was all that was said, and he passed
69 on and I passed on.

By Mr. ELLIOTT:

Q. State whether you came here in response to the subpœna or if you have been attending to or looking after this case at all.

A. No, sir; I haven't anything to do with it. I haven't been interested in the case at all since January, 1884.

Q. You came, in response to the subpœna you have spoken of, last night?

A. Yes, sir; I came in response to a telegram received last night.

Pl'ffs' counsel reads the subpœna to the court, together with the return which sets forth that the constable read this subpœna to the three defendants.

The COURT: They all say that he did not read it to them. As the case now stands, it seems to me that you have not shown the service of that subpœna. If you are taken by surprise the court may
70 relieve you of the consequences of that surprise, but I do not see how, in the face of what these defendants say, we can assume that that subpœna was served on them. One of them says that he was met on the street and merely told that he was wanted here at Erie.

Mr. ELLIOTT: We haven't the papers here. If we had it we should produce it. I think if the gentleman says they have been surprised, and they claim that we have paid $250, we will make no objection to their showing by parol that we paid $250.

Mr. DAVENPORT: That is not enough. We want to show the contents of that paper. We want it not merely as a receipt for $250, but we want the whole contents, and also the letters written by the bank in Buffalo.

The COURT: If the defendants answer under oath that they have not those papers that is the end of this subpœna.

Mr. ELLIOTT: All the other papers referred to except this receipt are papers that were left with Mr. Bell. We have had a conversation with him since he came here, and understand that every-
71 thing that came into his hands he has here. There is no disposition to keep back anything that we have. We will allow them to prove that we paid $250. That is as far as our admission will go.

Mr. DAVENPORT: That is not far enough for us. This receipt for $250 was simply a part of it, as we believe. That statement or receipt of $250 contained a full statement of the bargain between these parties.

The COURT: You haven't got it and haven't taken steps to get it here, and the question is, What is to be done? The other side are willing to admit the payment.

Mr. DAVENPORT: If they will permit us to prove the contents of that receipt I can understand then how it will be possible for us to go on.

Mr. ELLIOTT: They don't allege any written contract in their pleadings at all.

Mr. DAVENPORT: I think we will go on.

Resuming with the witness, Dr. WIGGINS:

Q. Now please proceed and tell us what transpired this
72 morning of the 21st when you went back after seeing Mr. Thayer, etc., as you have stated.

A. I left off where Mr. Bayne wrote out this certificate of deposit.

I called it that. It was a paper that was written and left with Mr. Bell.

Paper shown witness.

Q. This is the paper you refer to?
A. Yes, sir; written by Mr. Bayne.

Pl'ffs' counsel offer in evidence this paper identified by the witness, being dated November 21st, 1883, written by Mr. Bayne for Mr. Bell to sign as custodian of this and certain other papers.

Objected to as incompetent and irrelevant under the pleadings in this case.

The COURT: I don't think there is enough evidence in the case to admit this paper at present. At a subsequent stage in the case it may be admitted.

Mr. DAVENPORT, resuming:

Q. You say that you and Mr. Fuller agreed upon the terms of the sale of this land? What were the terms of the sale?

73 A. When they made me the offer on the 20th I supposed it was to be cash down, but on the morning of the 21st they insisted on paying me half cash and half notes—two notes bearing date three and six months, with interest.

Q. What was the entire bargain and arrangement as to the delivery of the deed, etc.?

A. After that was written Mr. Fuller says, "Now, to show you that we mean business, we will give you $250 as part of the first payment," and wrote out a receipt, and I think I signed it there.

Q. What did you do with that receipt?

A. I gave it to the parties, Mr. Fuller and Mr. Bayne. They were both there. Then we stepped into the bank, and he invited me in where the cashier, Mr. Bell, was, and said to Mr. Bell, "We want you to sign this paper, and when Dr. Wiggins produces the deed you give him these notes and this $4,750."

Q. After that did you send or cause to be sent to Mr. Bell a deed for this property?

A. Yes, sir.

Warranty deed shown witness.

A. This was on the morning of the 21st that this contract was consummated.

74 Q. Then where did you go?

A. Then I went home on the three-o'clock train to Buffalo, and on the 22nd had this deed made out and had it certified to on the 23rd and sent it back to Bradford, through the Bank of Commerce in Buffalo. They kept this deed, and on the 26th——

By Mr. ELLIOTT:

Q. Do you know of your own knowledge that they kept it?

A. I don't know where it was. They didn't send it back. It was sent to Mr. Bell through the Bank of Commerce.

Q. You left it with the Bank of Commerce?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.

Mr. DAVENPORT, resuming:

Letter shown witness.

Q. Here is a letter written by the Bank of Commerce, at the request of yourself, to Mr. Bell.

A. That is a letter from the bank.

75 Q. On the 23rd you went to the Bank of Commerce, in Buffalo, and left with the bank that deed to be sent to Mr. Bell?

A. Yes, sir; on the 26th I went to the Bank of Commerce, and they had a deed there from the parties sent to him from Bradford stating——

Objected to.

—there was a deed there for my wife to execute.
Q. And a letter accompanying it?
A. Yes, sir.

Letter and deed shown witness.

A. That is the letter and deed I found at the bank.
Q. A letter from whom?
A. It is signed——

Objected to.

A. I had this deed executed and sent back on the 28th.
Q. Sent to whom?
A. Through the bank to Mr. Bell.

Pl'ffs' counsel now offers in evidence this paper signed by Mr. Bell, which he was requested to sign by the parties, as appears from the evidence of the witness on the stand.

Objected to as irrelevant and immaterial; also that all the
76 defendants were not present at the time it was executed.

The COURT: This is a part of the transaction, and two of the defendants, at any rate, were connected directly with it, and it seems to me that it is admissible in evidence. What the effect of it may be we will see further on.

Exception by defendants' counsel to the admission of the paper.

Paper received and read to the jury by Mr. Davenport as follows:

"BRADFORD, PENN'A, *Nov.* 21*st*, 1883.

Received $4,750 from Bayne, Fuller, and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000; the balance to be paid in notes and money, as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed

of said land. The notes are to be $2,500 at three months, $2,500 at six months, both with interest."

Being signed "W. W. Bell, cashier," and written on the letter paper of the First National Bank of Bradford.

77 Mr. DAVENPORT, resuming:

Q. Now, you say you sent this deed dated November 26th, to Mr. Bell in pursuance of this contract?
A. Yes, sir.
Q. Where next did you see the deed? What became of the deed?
A. I suppose it went to him. I put it in the bank, the same as I had the other.
Q. By whom was it sent back to Buffalo?
A. By Mr. Bell. I think it was the 29th.
The COURT: What was sent back to Buffalo?
A. This last deed.

By Mr. DAVENPORT:

Q. By whom was this last deed prepared?
A. It was prepared in Bradford.
Q. Why was this second deed prepared for you to execute by them?

Objected to, that this must be taken from his previous testimony and from the letter.

Another letter shown witness.

A. This is one of the letters.
78 Q. A letter written by Mr. Bell?
A. Yes, sir.

It being written the 27th, and the signature being admitted to be that of Mr. Bell.

Also offers in evidence, along with this second deed, the letter written by W. W. Bell to the cashier of the Buffalo Bank, by which this second deed had been sent to Mr. Bell.

Objected to as being simply a declaration of Mr. Bell and not binding or affecting the defendants in any way.

The COURT: I think, perhaps, you better withhold this until you call Mr. Bell on the stand. I suppose you propose to call him.

Mr. DAVENPORT: I don't know that we shall. He is the agent of these parties and returns this deed for that reason. I think I will receive it. There is nothing in it more than what is already testified to.

Mr. ELLIOTT: There is a statement in reference to what the defendants desired done, and a declaration of that sort cannot be evidence against them.

79 The COURT: There is a statement in that letter, and whether it was authorized or not is not evidenced except by what Mr. Bell says. That is the point of that objection, and I am inclined to think it is well taken. You have already been permitted to show

the action of Mr. Bell in sending that deed back to Buffalo; but that letter contained a reason for that act which involves these defendants. I think you ought to withhold it for the present.

W. W. BELL, sworn and examined by Mr. DAVENPORT, testified as follows:

Paper shown witness, being stipulation already in evidence.

Q. That paper is signed by you?
A. Yes, sir.
Q. By whom was it written?
A. By Mr. Bayne.

Another letter shown witness.

Q. By whom was that written?
A. By me.
Q. Who requested you to write that letter?
A. No one; I did it in the order of my business.

80 Being dated November 27*nd*.

The COURT: That is a letter that you say no one instructed you to write?
A. Not specifically, that I recollect.

Another paper shown.

Q. By whom was that letter received at Bradford?
A. It was received by me.

Pl'ffs' counsel now offers in evidence letter signed by E. W. Hayes, dated November 23rd, 1883, at Buffalo, addressed to W. W. Bell, for the purpose of showing that the deed which was sent first was sent by the bank and received by him.

Objected to as incompetent for any purpose in this case.

Q. After the writing of this letter—at the receipt of this letter what, if any, deed did you receive from Mr. Hayes?

Deed shown witness.

A. I think this was the deed.

Being dated November 22nd, 1883.

Q. After the receipt of that deed what did you do with it?
A. I took it or sent it to Mr. Smiley to see if it was correct.
81 Q. Who was Mr. Smiley?
A. He was the bank's attorney.
Q. Was he also the attorney of these three gentlemen?

Objected to as immaterial.

The COURT: If he knows the fact that he was their attorney in this matter he may state it.
Q. Was he not the attorney of these three gentlemen?
A. I think he was.

Q. Was he not engaged by them previous to this time as attorney in this matter?

A. I don't know.

Q. That deed was submitted to Mr. Smiley at the suggestion of who of these parties?

A. I don't recollect.

Q. You did take it to Mr. Smiley at the suggestion of one or more of these three gentlemen?

A. I don't remember.

Q. Isn't it a fact that you did do that at their suggestion?

A. I couldn't say.

Q. After receiving that deed what did you do withit?

A. I gave it to Mr. Smiley to look at and see if it was right.

82 Q. What else did you do with it?

A. It was returned to me and another form brought back with it.

Q. You showed that to Mr. Smiley and he then prepared that deed?

Another deed shown witness.

A. I think so.

Being dated November 26th, 1883.

Q. Who gave you this deed—Mr. Smiley or one of these three gentlemen?

A. I think it was Mr. Smiley.

Q. What, if any, conversation did you have with either of these three gentlemen about this second deed?

Objected to as incompetent and objection overruled.

Adjourned until two o'clock.

83 *Afternoon Session.*

W. W. BELL, further examined by Mr. DAVENPORT, testified as follows:

Letters dated November 24th, 27th, and 29th shown to witness.

Q. State whether or not those are in your handwriting and signed by you.

A. Yes, sir.

Another letter shown.

Q. That letter dated Buffalo, Nov. 23rd, addressed to W. W. Bell, was one which you received from the bank?

A. Yes, sir.

Q. Along with the contents referred to in it?

A. Yes, sir.

Q. At the time and before the making out of this deed by Mr. Smiley wasn't Mr. Smiley the attorney of these three gentlemen?

Objected to.

Q. Do you know whether he was or not? Who was their attorney at Bradford?

A. I suppose Mr. Smiley was.

84 Q. Now, then, this second deed, after you received it, I wish you to state what you did with it—this deed prepared by Mr. Smiley, the attorney of these gentlemen. After it was signed and acknowledged and returned from Buffalo to Bradford what did you do with it?

A. I don't remember receiving it.

Q. You don't remember receiving it?

A. No, sir; I don't remember it.

Q. Didn't you swear this morning that you had received this deed?

A. I think not; not from Buffalo—the second deed.

Q. Then you think you didn't receive this second deed?

A. I don't know. I found only that one letter, which was one that I returned, and I see that I returned deed in it. I had one deed at that time. It was the first deed. I don't know whether I received the second deed or not.

Q. Wasn't this the deed which you sent back on the 29th of November the second deed?

A. I sent the first, and if I received the second I sent that back at the same time, but I don't remember receiving it.

Paper shown witness dated the 29th.

Q. At whose suggestion did you write that letter dated the
85 29th?

A. It says here at request of Bayne, Fuller and Melvin.

Q. That is what the letter says?

A. Yes, sir.

Pl'ffs' counsel now offers in evidence the three letters identified by Mr. Bell, dated respectively the 24th, 27th, and 29th of November, 1883; also offers letter of November 23rd, written by the cashier of the Buffalo Bank to Mr. Bell.

Def'ts' counsel object to all the letters as incompetent against the defendants, that they are at most but declarations of this witness.

The COURT: I don't see that he says anything in this correspondence that is against the defendants, anything more than he explains the transactions as they occur. I think that is about all there is of it. One of these letters, I understood the witness to say, was written at the request of the defendants. I think I will receive these letters.

Exception by def'ts' counsel to the reception of the letters, which are read in evidence by Mr. Davenport.

86 Q. Did you not receive this second deed from Buffalo?

A. I don't know.

Q. To the best of your recollection, did you not receive it from Buffalo? What is your recollection of receiving this from Buffalo?

A. I have no recollection of it—no recollection of receiving it. There is one thing I would like to say, and that is that the subpœna

that was given to me didn't say anything about letters from the Bank of Buffalo, and Saturday I was subpœnaed with a new one with this amendment put in, and I went through my letters of November, 1883, and found only this one letter. I think I would have found any other if it had been there.

Q. But you didn't find the copies of the letters you had written?

A. Only a copy of the one letter.

D. B. WIGGINS recalled, and further examined by Mr. DAVENPORT:

Q. Now, after returning that deed, when next did you see it, and where—I mean the last deed, written by Mr. Smiley?

87 A. I sent this deed up on the 28th and it came back on the 29th, together with the other deed that I sent first and this letter from Mr. Bell.

Pl'ffs' counsel offers and reads in evidence the following letter:

"NOVEMBER 29TH, 1883.

E. W. Hayes, Esq., cashier.

MY DEAR SIR: By request of Bayne, Fuller and Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins, giving the reasons for so doing.

Yours truly, W. W. BELL."

Q. What letter did you receive from Mr. Smiley, the attorney of these three gentlemen?

A. That letter in that envelope.

Pl'ffs' counsel now offers in evidence the following letter from Mr. Smiley:

"BRADFORD, PA., *Nov.* 27, '83.

D. B. Wiggins, Esq.

DEAR SIR: Bayne, Fuller and Melvin decline absolutely to purchase the 80 acres of land in La Fayette, this county, and ask you at once refund the money paid and return receipt given.

88 They have been put in possession of the facts in detail as to the means used by yourself in collusion with others to try and induce them to make the purchase. In addition to this the title to the land is not good, and they decline to accept the deed offered and have directed the same to be returned. Prompt action on your part is demanded. If you do not at once return the money and receipt I have advised them to promptly take such action as the facts now in their possession certainly justify.

N. B. SMILEY."

Being in an envelope postmarked Bradford, November 29th.

Q. Now, after receiving that letter, which I will also read in connection with this, being already offered in evidence, dated November 29th, 1883, written by Mr. Bell: "E. W. Hayes, Esq.: By request of Bayne, Fuller and Melvin, I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins giving reasons for

so doing." Now, after receiving the letter from Mr. Bell and the two deeds which you had theretofore sent up to Mr. Bell and the letter from Mr. Smiley, what did you do?

A. On the 30th, which was the next day, I took the deed which they made out and went up there to see what the trouble
89 was. I went to my attorney, and we went over to the bank and demanded the money and the notes.

Q. Who did you see at the bank?

A. Mr. Bell. He refused to give it up, and my attorney said to him that he should keep the money.

Q. What, if anything, did you say to him as to his reasons for refusing to carry out the contract?

A. He didn't give any reasons. I then went upstairs to Mr. Fuller's office. Mr. George and myself went up, and Mr. Bayne and Mr. Fuller were there, and Mr. George wanted to know why they didn't accept that deed. Mr. Fuller was the spokesman, and said he believed there had been undue influence exercised, and I said there was none on my part, so far as I was concerned; that I hadn't used any undue influence to induce him to buy the land, and he said he didn't accuse me, but he thought others had, and that he thought the title was imperfect. That ended the conversation. Mr. Bayne had nothing to say at all.

Q. What did he say about paying the money as agreed to?

A. Nothing, as I recollect. We had already demanded the money of the custodian.

Q. Have you stated the whole of the conversation; by whom was it said that undue influence had been used?

90 A. Nothing; they didn't make any explanation; only he said that he didn't accuse me of using undue influence, but he thought others had done it.

Q. What defect did he claim there was in the title?

A. He made no explanation.

Q. He made no explanation as to the defect in title that he alleged?

A. No, sir.

Q. Nor as to the undue influence?

A. No, sir.

Cross-examination by Mr. ELLIOTT:

Q. You came to Bradford how many days before the 21st of November?

A. On the 20th, in the afternoon.

Q. Did you see Bayne and Fuller on that day?

A. I saw Mr. Fuller; I didn't see Mr. Bayne.

Q. Did you see he or Mr. Bayne frequently for the next 48 hours?

A. I saw Mr. Bayne the next morning for about half an hour or such a matter while we were fixing up this trade. That is all.

91 Q. Do you mean to be understood that the two times spoken of in your direct examination are the only interviews you had with them at that time while you were at Bradford?

A. I think so in reference to this land. We might have passed the time of day or something like that.

Q. I want to know whether you didn't importune them several times and ask them to purchase this property and show them letters from other parties of recommendation?

A. No, sir; never but the once, and that was on the afternoon of the 20th.

Q. Didn't you call on them at the office at least six or eight times during the 48 hours?

A. No, sir.

Q. When you first went there to see them, as I understood you, you asked him about the responsibility of some other party?

A. Yes, sir; asked Mr. Fuller; Mr. Bayne was not present.

Q. At that interview you told him that you had been offered so much for the property?

A. Yes, sir.

92 Q. You told Mr. Fuller so?

A. Yes, sir.

Q. And you inquired about the responsibility of the gentleman who had made the offer?

A. Yes, sir.

Q. And you were informed that he was entirely responsible?

A. Mr. Fuller said that he considered him responsible.

Q. And you said to him that you were offered $150 an acre?

A. Yes, sir.

Q. And that there were 80 acres in the property?

A. I don't know about that.

Q. Didn't you tell him that was your understanding?

A. I supposed there was eighty acres. Land usually overrun, but the deed only calls for 147 acres.

Q. Didn't you tell Mr. Fuller or Mr. Bayne that there were eighty acres, and that you had been offered $150 an acre?

A. No, sir; I couldn't say that. I supposed there were 80 acres, but it hadn't been surveyed.

Q. Didn't you tell them you supposed there was eighty acres?

A. I might.

Q. And didn't they tell you that you had better make that sale and they would cash the paper?

93 A. Not a word of it, sir; never.

Q. Didn't they say they would cash that paper without recourse to you?

A. No, sir; never. I have heard that intimated here, but I want it distinctly understood that I never made that offer, for I should have taken it.

Q. Didn't they offer to make the discount, if you would make the sale, without recourse to you for what you said you were offered for it?

A. No, sir.

Q. And didn't you tell them you had rather sell to them at a lower price?

A. Yes, sir; I told them that for cash.

Q. Didn't you tell them you would rather sell to them for cash at a lower price on the same terms and the same time?

A. No, sir; that I am distinct about. I wanted to sell it for cash, and they offered me $10,000 cash in the afternoon.

Q. Didn't Mr. Bayne inform you at that interview on that day that if you could make that sale that they would pay you $10,000 in cash for the paper so that you could leave on the 3.30 train?

94 A. Mr. Bayne wasn't present when this conversation took place on the afternoon of November 20th.

Q. Didn't he so tell you in their negotiations with you for this property, so that you could leave on the afternoon train; did he not state to you that if you would sell in accordance with the terms you had been offered that he would cash the paper and give you $10,000 for it, so that you could leave on the afternoon train without recourse to you?

A. No, sir. Mr. Bayne importuned me two or three times that morning to know what I would take for their paper—to cash their paper that was to run three and six months; and that was all the cashing business there was about it.

Q. I thought you said they were to pay cash?

A. They were on the afternoon of the 20th; on the morning of the 21st they made another proposition—that they would give half cash and one note for three months and another for six months, with interest.

Q. And you say you didn't tell them you would rather sell to them at a lower price than to sell to the other party?

A. I would sell for a lower price provided it was for cash, but not on time.

95 Q. Didn't you exhibit to them letters and telegrams form other parties as an inducement for them to purchase?

A. No, sir; not as an inducement. I merely showed it to them to show that I had been offered that much.

Q. That was considerable more than you proposed to ask from them?

A. It depends on what basis we set the land at. If there wasn't but 72 acres——

Q. It would be $700 or $800 more at that?

A. It might be something like that, but my idea in selling for cash was to save trouble in collections.

Q. You didn't sell for cash to them?

A. They made another proposition in the morning for three and six months, which I didn't think made much difference.

Q. Who made the other proposition?

A. I think it was Mr. Fuller.

Q. Was Mr. Bayne present?

A. Yes, sir.

Q. Was he present when you had the talk with Mr. Fuller the day before?

A. No, sir. Mr. Fuller said to me, "I will go down and see my pard." I supposed he meant his partner, and he went down-stairs

and came back in about 15 minutes and said they had made
96 up their minds to pay me $10,000 for that lot. If Mr. Bayne had been there there wouldn't have been that necessity.

Q. When you went into the bank after the arrangement you say was concluded and this paper was drawn and signed by Mr. Bell, you went into the bank with Fuller and Bayne?

A. Yes, sir.

Q. They didn't pay any money over to the cashier?

A. Not that I saw; the cashier gave me $250.

Q. They didn't place any notes in the hands of the cashier?

A. I didn't see any.

Q. You knew the fact that they didn't place any money or notes in his hands when they gave this paper?

A. I didn't see them do it; they might have done it on the sly or around the corner or some place.

Q. If they did it at all they did it on the sly?

A. They must; I didn't see them do it.

Q. You sold this property to them as your property?

A. No, sir.

Q. You made the bargain as your property?

A. I don't know but I might have said that I wanted to sell that property, or something of that kind.

97 Q. Did you disclose the fact that you were acting for any one else until after the arrangement was completed, so far as you did anything that day?

A. I don't remember. I don't remember that I did. I sold the other the same way—the north half of it. My wife sanctioned it and made out the deed.

Q. You dealt with them as though it was your own property?

A. I don't think I called it my property.

Q. You didn't call it any one else's?

A. I don't think I did; I was acting as agent for my wife the same as I had done before.

Q. When this paper was drawn you were dealing with them the same as if you owned the property? This statement says that they had purchased of D. B. Wiggins?

A. Mr. Bayne made that out and I didn't correct it.

Q. When did you first inform them that the title to this property was in your wife and not in you?

A. I suppose when they got the deed.

Q. When they got the first or second deed?

A. The first deed.

Q. The first deed was signed by you and your wife?

A. Yes, sir.

Q. You didn't inform them at all, did you?

98 A. I don't think I did particularly.

Q. You didn't in general?

A. I don't remember now that I did.

Q. The first deed which you say you sent was returned by the bank in Buffalo?

A. Yes, sir; on the 29th.

Q. All you know of what occurred is what you were informed by the bank at Buffalo, through which you were doing business?

A. Occurred where?

Q. Between the bank and the defendants or the bank and Mr. Bell.

A. Yes, sir; that is all that I know.

Q. And on the return of that deed to you by the bank you and your wife executed another deed?

A. We did, before the first one was returned.

Q. Did you have this deed with you at the time you went to see Mr. Fuller?

A. Yes, sir.

Q. On the 30th?

A. Yes, sir.

Q. You took it away with you?

A. I took it back to Buffalo.

99 Q. It has been in your custody ever since?

A. Yes, sir.

Q. This is the same property that you and Mr. Hexstein owned?

A. Yes, sir; it was sold on a mortgage that we gave.

Q. As your property and C. N. Mead's and Hexstein's?

A. Hexstein and Wiggins.

Q. And conveyed by the sheriff to your wife?

A. Yes, sir.

Q. Have you the telegram and letter that you exhibited to these people at the time you allege you made this contract with them?

A. Yes, sir.

Pl'ffs' counsel produces them.

Q. How did you come to show Mr. Fuller and Mr. Bayne this letter from Barnsdell?

A. To show them that he had made me an offer for the land and wanted to buy it; that is all.

Q. Wasn't it for the purpose of inducing them to purchase?

A. No, sir; I never intended it that way.

Q. Mr. Barnsdell was then operating at Bradford?

A. I think he had an interest on the north half of this same

100 lot, the original lot. I think he was operating there at the time or doing something.

Q. Did you see him on your visit at that time?

A. No, sir.

Q. When had you seen him before?

A. I think it was a day or two before.

Q. Where?

A. At Buffalo.

Q. On what day did you see him at Buffalo?

A. It was on the evening of the 19th, I think; the day before I went to Bradford.

Q. November 19th?

A. Yes, sir.

Q. You saw him at Buffalo the day you started to go to Bradford?

A. The evening before. I started to go on the 20th.
Q. And after you saw him you came to Bradford?
A. Yes, sir.
Q. Did you come there to meet Mr. Barnsdell?
A. No, sir.
Q. Did you have any talk with Mr. Barnsdell about this property when you saw him the night before?
A. Yes, sir.

Q. And you didn't come to Bradford in pursuance of the
101 arrangement you had with him?

A. No, sir; not wholly. He referred me to the banks as to his responsibility—the banks of Bradford. That was partly my visit up there.
Q. Did you get the letter to which you called the attention of Mr. Fuller and Mr. Bayne through the post office?
A. Yes, sir.
Q. It was not left by you with Mr. Barnsdell when he was there the night before?
A. No, sir; I got it on the 19th.
Q. Have you the envelope it came in?
A. No, sir; I have not.
Q. Do you know whether this letter was mailed from Bradford — where it was mailed from?
A. From Bradford.
Q. When you made inquiries about Mr. Barnsdell you found these people were willing to take his paper without recourse to you?
A. No, sir.
Q. Didn't they say they would take it without recourse to you?
A. No, sir; they said they considered him responsible.
Q. You agreed with these people when you had this talk with them at Bradford—Mr. Fuller and Mr. Bayne—to give them
102 a good title to this property?

A. I agreed to give them the title. I supposed it was good, of course.
Q. Didn't you agree to give them a good title?
A. I think likely; yes, sir. I didn't think there was any question about the title my wife had, and I was to give them that title.
Q. I am not asking about that; I am asking about what occurred there.
A. I think that receipt states it.

Pl'ffs' counsel offers in evidence letter of November 19th, signed by T. N. Barnsdell, which they have called out and examined him about.

Objected to as incompetent and irrelevant. (Objection withdrawn.)

Reads the letter of November 19th, as follows:

"I will take the land, as we talked, at $150 per acre, one-fourth cash and the balance in 4, 6, and 12 months, with interest. Get your deed ready and I will come there, or you may come here, just as you choose.

"T. N. BARNSDELL."

Next offers telegram as follows:

103 "I will take the land as we talked. See letter.
"T. N. BARNSDELL."

Being of same date as the letter.

By Mr. DAVENPORT:

Q. At the time of this conversation with Fuller what, if any, recollection have you of any conversation about the title or the sheriff's deed?

A. I don't recollect having any about that. If there had been any I think it must have been the next morning when we were talking about the quantity of land. I think I had the sheriff's deed with me. I am quite sure I did.

Q. What, if anything, was said about it in that second conversation?

A. I don't remember anything being said.

Q. Was the sheriff's deed produced in your conversation at any time?

A. No, sir; I always supposed the title to the land was perfect.

Q. What, if anything, was said about the title being in your wife's name in either of the conversations?

104 A. I don't remember anything being said.

Q. When you came with the deed to Bradford after you had received it from this trustee, Bell, what, if any, objection did they make to accepting the deed written by Mr. Smiley, their own attorney, on the ground of the title not being good?

A. Nothing.

Q. The only objection they raised is the one you have told us about already?

A. Yes, sir.

Q. They didn't particularize any objection to the title?

A. No, sir; they simply said they didn't think the title was good and that there had been undue influence. I think I asked them where the difficulty was in the title, and they wouldn't tell. I am quite sure we did.

Q. Who was present at that interview?

A. Mr. Bayne and Mr. Fuller and Mr. George, my attorney.

Q. Mr. Melvin wasn't there?

A. No, sir.

By Mr. ELLIOTT:

Q. When you went with Mr. George to Mr. Fuller's office you made a tender to him of this deed at that time?

105 A. I don't think I did.

Q. Didn't you make a tender or Mr. George make a tender for you in your presence?

A. I think not. We made a tender of the deed to Mr. Bell.

Q. Didn't you make a tender to Mr. Fuller—you or Mr. George for you—and tell him you had come there to make a tender of the deed and demand the pay?

A. I might have told him that, but I didn't tender the deed to him.

Q. Didn't you tell him that you had come there to tender the deed to him and demand the pay?

A. No, sir; we merely went there to inquire of him what the trouble was.

Q. Didn't you show it to him?

A. No, sir.

Q. Or Mr. George?

A. No, sir.

Q. Didn't you or he take it out and exhibit it to him and say, "We tender you the deed," or words to that effect?

A. No, sir; I think not.

Q. You didn't, either of you, show him the deed after you got it from Bell?

A. No, sir; I don't think we did.

106 JAMES GEORGE, sworn and examined by Mr. DAVENPORT, testified as follows:

Q. Where do you reside?

A. Bradford, McKean county, Penn'a.

Q. I wish you to state when, if at any time, you remember in November of seeing this deed written by Mr. Smiley.

Deed shown witness.

A. As near as I can fix the time, it was on the 30th of November.

Q. Who had that deed?

A. Dr. Wiggins handed it to me.

Q. What did you and Dr. Wiggins do, having that deed in your possession?

A. Dr. Wiggins came to the office and showed me that receipt of Mr. Bell's.

Q. This receipt, which has been already offered in evidence, dated November 21st?

A. Yes, sir; and he explained the circumstances and I concluded——

Objected to.

We then went to the bank and demanded——

Q. Who did you see at the bank?

A. Mr. Bell.

107 Q. The gentleman who signed that receipt?

A. Yes, sir; I asked Mr. Bell for the money and the notes.

Q. What did you say about the deed to him?

A. I asked him also why he returned the deed to Buffalo and he said that he had been advised to do so.

Objected to—to what Mr. Bell said at that time.

The COURT: You may prove that he refused to take the deed; as to proving things that he said, except the refusal to accept the deed, I am not sure about.

Receipt dated November 21st, 1883, signed by W. W. Bell, shown to witness.

Also deed made by Mr. Smiley, attorney for defendants, dated November 26th, 1883, shown witness.

Pl'ffs' counsel offers to show by the witness on the stand that in company with the plaintiff, having in their possession the deed and the receipt, they called at the office of W. W. Bell and demanded of him the securities named in the receipt and offered to him said deed; that they inquired of him why he had not sent the securities instead of sending the deed back to Wiggins after he had sent it to him, and asked him to take the deed and deliver the securities mentioned in said receipt.

108 Def'ts' counsel object to so much of the offer as proposes to give the declaration of Mr. Bell.

Objection overruled and exception by def'ts' counsel.

A. Mr. Bell said that he kept the money and returned the deed under advice from Bayne, Fuller and Melvin, the defendants.

Q. What did he say about taking the deed from you and handing over the securities mentioned in that receipt?

A. He refused to do that. I made a tender of the deed and demanded it there, and he refused to do it and referred me to them—Bayne and Fuller—for an explanation. I then started for their office and met Mr. Melvin, one of the defendants, and made a demand of him and he refused to have any conversation with me, but sent me on to the office of Bayne and Fuller. Dr. Wiggins and I then went to the office of Bayne and Fuller and demanded of them the money and securities and tendered the deed.

Mr. BROWN: You tendered the deed to Bayne and Fuller?

A. Yes, sir; and Mr. Fuller replied and said they thought there was undue influence used in getting them to purchase this property, though he didn't charge it upon Dr. Wiggins, and then he mentioned something about the title being imperfect.

109 By Mr. DAVENPORT:

Q. What, if anything, did you say to them about what the defect was in the title?

A. I asked Mr. Bayne what the defect was, and that if there was anything we would remedy it right away, and he refused to give me any information on the subject, but replied that any novice would notice it, and I said I supposed the title was good, inasmuch as the attorney who drew it for him had passed on the same title before in the sale of the northern half of the same property and called it good, and therefore we hadn't examined it.

Q. Who was the attorney?

A. Mr. Smiley.

Q. What else passed, as near as you can remember?

A. Mr. Fuller then said that he wouldn't do anything more about it; that he expected he would sue them, but that they would stand a suit; that they wouldn't have any fraud perpetrated upon them. I don't remember anything else that was said at that time.

Q. Within a few days I wish you to state what, if any, conversation you had with Mr. Melvin concerning this matter.

Objected to and overruled.

110 A. I saw Mr. Melvin a day or two ago about having him come to Erie in this case. He didn't want to come. When I met Mr. Melvin I was talking with him about coming to Erie as a witness, and he said that he didn't know anything about the case and didn't want to come, and I told him what I wanted to prove by him, and that was that they had purchased the property and that he had undertaken to sell it to a man by the name of Chapin, who represented the firm of Chapin and Chapman. He answered and said there was no question but that they had bought the property, and the other parties would not try to defend on that score; that they had bought it and paid a part of the purchase-money, and he said he would see whether they were going to defend on that score, so that he would not have to come.

Q. Was any price named at which he was to sell it in that conversation?

Objected to.

Q. Nothing was said, I believe?

A. No, sir; I think not.

Q. Did you have any conversation with any one else about the matter—with any other of the defendants but Mr. Melvin?

A. I had a conversation on Saturday with Mr. Bayne.

111 Q. What was that?

A. It was on Saturday last. I was talking to Mr. *Bell*, and he volunteered that he didn't want Mr. Bell to come, and they weren't going to deny that they had bought the property and paid part of the purchase-money and could not get out of it.

Q. Who said that?

A. Mr. Bayne. He said they couldn't get out of it.

Cross-examined by Mr. ELLIOTT:

Q. You were attorney for Mr. Wiggins at the time you and he went up to Mr. Fuller's office?

A. He asked me to go with him.

Q. You went there as his attorney?

A. I presume so.

Q. Don't you know?

A. Yes, sir; I did.

Q. Did you make the tender when you went to Fuller's room, or did Mr. Wiggins?

A. I did.

Q. Mr. Wiggins was present?

A. Yes, sir.

112 Q. What did you say when you made the tender?

A. I think the first remark was that Mr. Bell had referred us to them.

Q. What was the language?

A. I don't think I could recall it. I said that I had the deed here, and it was ready for them as we had prepared it, and asked for the money and notes.

Q. That was declined?

A. Yes, sir.

Q. The deed was declined, and Mr. Wiggins went away with the deed?

A. Yes, sir.

Q. Have you had the deed ever since?

A. Yes, sir.

Q. You are the attorney of record in this case?

A. Yes, sir.

Q. And you have been conversing with two of the defendants since this court commenced?

A. Just as I have related.

Q. One of them three or four days ago—one on Friday and the other on Saturday.

A. Yes, sir.

Q. What were you talking with Mr. Bayne about when he
113 came to make that statement to you?

A. I don't think I was talking to him. I was talking to Mr. Bell. He may have interfered and got my attention so that I began to talk to him; but I went to subpœna Mr. Bell and did subpœna him in front of the bank at the cashier's stand. He called me into the back room to show me some letters that he had copied and sent to E. W. Hayes, of Buffalo, and while we were there Mr. Bayne came in and rather begged of me to let Mr. Bell stay at home; that they couldn't spare him from the bank, and said they could get the case continued if they didn't want to try it, and said all those things; and I told him we weren't sure of their defense and wanted to prove some things by Mr. Bell to bring up the chain of title and prove that they had bought the property, and he said they would not deny that. He said he had bought the property and paid $250 on it, and could not avoid taking it.

Q. Said what?

A. Said they had bought the property and paid $250 on it, and wouldn't defend on that score.

Q. When did you have this conversation with T. J. Melvin?

A. On Sunday.

Q. That was when you asked what he would swear to?

114 A. No, sir; I told him what I wanted, and asked him if he would swear to such things, and he said that he would—that that was just right. I told him that I couldn't get Mr. Chapin, to whom he made the proposition.

Q. All you asked of him was if he had offered to sell this property.

A. I didn't ask him if he could swear to anything.

Q. Did you ask him if he knew that?

A. No, sir.

Q. What did you ask him?

A. I didn't ask him any question. I told him we desired to prove

by him that they bought the property and he undertook to sell it to Chapin and Chapman, and he said that he didn't deny that they bought the property.

Q. What was his language? Just use his language.

A. He says, "We don't deny that we bought the property and paid a portion of the purchase-money." He says, "They are not going to avoid the fact that they bought it."

Q. Did he not say that they didn't deny having purchased the property? Did he say "we?"

A. Yes, sir; he said, "We are not going to deny that." Of late he doesn't seem to have any interest in the suit; he did at that
115 time, but not now, except as nominal defendant.

Q. Isn't this the conversation that occurred between you and Thos. J. Melvin; if you didn't say to him, "They admit they bought the property," and he said, "If they do there is no use in your taking me up there?"

A. I think I told him that Mr. Bayne said to me the day before that they bought the property.

Q. Isn't that the way it occurred? Didn't you say, "They admit they purchased the property," and didn't he reply, "If they admit that they purchased it there is no use in taking me up there?" Wasn't that language used?

A. No, sir; I didn't say that they admitted it; I said that Mr. Bayne admitted it.

Q. Then didn't he say to you, "There is no use in your taking me up there if Bayne admits it?"

A. I think he did.

Q. Isn't that all the statement that he made—all the admission that he made in reference to the ownership of the property?

A. No, sir. We had talked that all over before I told him of Mr. Bayne.

Q. You didn't go there for the purpose of getting information of him and making yourself a witness?

116 A. No, sir; I don't like that kind of business.

R. H. THAYER, sworn and examined by Mr. DAVENPORT, testified as follows:

Q. Are you acquainted with the parties to this case?

A. Yes, sir.

Q. I wish you to state what, if any, conversation you had with either of the defendants concerning the subject-matter of this case.

A. Previous to the purchase or since?

Q. Since the purchase.

A. I don't recollect having any special conversation with them since that time.

Q. With either of them concerning what, if any, interest he had in this; whether either one of the defendants, Bayne, Fuller, or Melvin, had bought it.

A. I met Mr. Bayne this morning and had a little conversation with him about it, but not to amount to anything.

Q. What, if any, conversation did you have with him?

A. He asked me what I thought of this Dr. Wiggins case.

117 Q. What did he say about the matter?

A. I didn't pay especial attention to what he did say. He said there was no question but what they bought the property. I think he said that—that they didn't deny but what they bought it; but I think he said there was some collusion or something was the reason they didn't take it.

Q. Are you acquainted with this Wiggins tract of land?

A. Yes, sir.

Q. How many years have you been acquainted with it?

A. Four or five years, I should say, from recollection.

Q. Are you acquainted with the value of real estate in the neighborhood of this?

A. Somewhat; yes, sir.

Q. What, in your opinion, is the value of that property now—the Wiggins property?

Objected to as incompetent.

The COURT: There is no doubt but that this is an improper question. It is entirely incompetent to show the value of the property now.

Objection sustained and exception by pl'ffs' counsel.

118 T. M. BARNSDELL sworn, and examined by Mr. DAVENPORT:

Q. Where do you reside and did reside in 1883?

A. Bradford, Pa.

Q. What, if any, conversation did you have with either of these three defendants, Bayne, Fuller, or Melvin, concerning this transaction?

A. I didn't have any talk with any one; but Fuller spoke to me one day and said I could have part of the land for cost if I would let him know what was in my well. He wanted to know about my well.

Q. What did he say about their having bought or he having bought this property?

A. I don't think he said anything to me about it. That is all that he said. I had heard that he had bought it.

Q. Try and repeat the words as he stated them to you.

A. I don't know whether it was half or part of it that he said I could have at cost; it was either half of it or part of it.

Q. If you would what?

A. Let him know what was in my well.

Q. What reply did you make to him?

A. I didn't want it. That was all the reply that I made.

Q. Can you tell us when the conversation took place?

119 A. I should think it was about somewhere between the 25th and 30th of November, 1883.

Q. Between the 25th and the 30th of November, 1883?

A. Yes, sir.

Q. Did you have any conversation with either of the other defendants?

A. I don't remember it. I used to talk a little with Melvin about it. That was all.

Q. What did you have to say with Melvin about it?

A. Nothing, only after they refused to take the land I talked with him a little; nothing at all to amount to anything.

Q. Whereabouts were you when you had this conversation with Mr. Fuller?

A. At the foot of the stairs going up to Mr. Smiley's office, on Congress street, in Bradford, Penn'a.

Cross-examination by Mr. ELLIOTT:

Q. Who was present when you had this conversation you speak of at the foot of Smiley's stairs?

A. I don't remember any one.

Q. Wasn't Mr. Bayne there?

120 A. I didn't see him.

Q. Don't you remember his being on the stairs?

A. No, sir; he might have been, but I didn't see him.

Q. Didn't Mr. Fuller and he walk over where you were and he stand there while the conversation took place?

A. No, sir; I didn't see him there any way. The conversation was very short.

Q. It was about the 25th?

A. It was somewhere between the 25th and the 30th.

Q. Do you remember the day of the month?

A. I couldn't remember the day of the month.

Q. Or the week?

A. Yes, sir; I can remember the day of the week, I think; no, sir; I cannot remember the day of the week.

Q. Have you any memorandum book, by which you can fix that day, here with you?

A. No, sir; I cannot tell you what day it was.

Plaintiffs rest.

121 Def'ts' counsel first offers exemplification of the assessment of unseated lands in La Fayette township, McKean county, Penna., for the years 1868–'9, in the name of C. N. Mead and Co., owners; warrants 2255 and 3432; 250 acres; valuation, $1,250.

Objected to for the reason, first, that it does not contain a reference to the property described in the plaintiffs' declaration.

Second. That this is only a partial exemplification of the unseated lands in La Fayette township and does not pretend to be a complete list.

The COURT: Unless they connect it with this land, of course it amounts to nothing. I will receive it for the present, at any rate. If you have the evidence to explain it you may put it in.

Received in evidence, and exception by pl'ffs' counsel.

Next offers exemplification from the treasurer's duplicate of McKean

county for 1868–'9, in La Fayette township, showing the payment of certain taxes on part of this and a sale of this sixty-two and a half acres by the treasurer, sold June 13th, 1870, to W. A. Wil-
122 liams; to be followed by evidence of the execution of the deed.

Objected to that the amount of land sold is 62½ acres and the amount in the deed is 70; also that it all lies in warrants 3433 and 3432, and that the land sold lies in warrants of totally different numbers; also that the description in the sheriff's deed contains 147 acres of land, of which this land in question is a part and not a part of the 250 acres of land alleged to have been sold in tracts 2255 and 3432; that it is conclusive that the 147-acre tract is a different tract from the 250-acre tract; also that the sheriff's deed was made in 1878 and this alleged treasurer's sale was in 1870.

The COURT: There are three things that tend to indicate that it may be the same land—the number of one of the tracts, the name of Mead and Company, and the township. I think I will receive the evidence and you may be able to explain it in such a way that I may give the jury peremptory instructions. I don't think I ought to rule it out, for I would then undertake to decide judicially that it was not the same property.

Exception by pl'ffs' counsel.

123 HENRY KING, sworn and examined by Mr. MORRISON, testified as follows:

Q. Where do you reside?
A. Bradford, McKean county.
Q. Did you know W. A. Williams in his lifetime?
A. I knew him for a number of years before he died.

Def'ts' counsel proposes to show that he, as administrator of W. A. Williams, has made search among his effects and cannot find this deed, and then proposes to offer an exemplification to show that a treasurer's deed, in pursuance of this sale, was made and executed to Wm. A. Williams.

Q. You have stated that you are the administrator of Wm. A. Williams?
A. I am.
Q. You may state whether or not you had his safe and papers and effects in your custody.
A. Yes, sir.
Q. How long has he been dead?
A. He died in November, 1881.
Q. What, if any, search have you made for the treasurer's deed to Wm. A. Williams of June 13th, 1870, for land in La Fayette township?
124 A. Right away after he died I searched through his papers and deed, not particularly with this one in view; but thi

was not among them ; and a week or two ago I searched again with this deed in view and couldn't find it.

Q. Did you make diligent search ?

A. I knew where it would have been if it had been there.

Q. Did you find it ?

A. No, sir.

Q. Have you any knowledge of where it is ?

A. No, sir.

Def'ts' counsel now offers exemplification from the prothonotary's office of McKean county, certified by the prothonotary and by the president judge, of the acknowledgment of the deed, for the purpose of showing first that there was a deed acknowledged, and to show what the contents of it were, being among the proceedings of the court of common pleas of McKean county.

Received and read in evidence by Mr. Morrison under the same objection and exception of pl'ffs' counsel.

125 J. M. FULLER recalled and further examined by Mr. ELLIOTT:

Q. Do you remember the circumstance of Mr. Wiggins and Mr. George coming to your office at any time ?

A. I do.

Q. In Bradford ?

A. Yes, sir.

Q. State what was said by Wiggins or George in reference to a deed of the property in controversy in this case.

A. Mr. George had a deed and presented it to me with a demand for the money and notes in accordance with the agreement of a few days before that.

Q. What did he say in reference to the deed ?

A. I don't recollect that he said anything more than to make a formal demand for the money and notes, and said that he had a deed and showed it to me then.

Q. State whether you had ever seen that deed before.

A. I never had.

Q. Had you ever known of its existence after it was executed ?

Objected to that he says he never saw it, and that is enough.

Q. Had you ever had any previous knowledge of its exist-
126 ence as an executed deed ?

A. No, sir.

S. G. BAYNE recalled for further examination by Mr. ELLIOTT:

Q. You are one of the defendants ?

A. Yes, sir.

Q. When was the first time that you ever had any knowledge of the existence of the deed referred to as the last deed executed by Wiggins and wife ?

A. At the time Mr. George had it in his hands in my office.

Q. The time that Wiggins and George were there together ?

A. Yes, sir.

Q. State whether or not you had ever heard of that deed before.

A. I never knew of its existence.

Q. Some evidence has been given in reference to your statement to Mr. George in reference to having made a bargain for this land. State just what you did say to Mr. George on that subject.

127 A. We had a conversation about the necessity of bringing Mr. Bell to Erie, and I said that we would of course acknowledge that we had paid $250 on this land, and that it had been bought verbally, and that I didn't see that there was any necessity to take Mr. Bell from the bank, because Mr. Fuller and myself and Mr. Bell were the three officers of the bank, and it would be a dangerous thing to have the three officers away at one time, and I besought him not to bring Mr. Bell to Erie. That is substantially what took place.

Q. What was the conversation you had with Mr. Thayer this morning to which they called your attention?

A. We were talking about the case and Mr. Thayer asked me what there was about it, and I said there wasn't very much to it, I thought, and I said of course we couldn't deny that we had paid $250 on the property and didn't propose to deny it, and that it was bought verbally, and that we had bought it under misrepresentations.

J. M. FULLER recalled and further examined by Mr. ELLIOTT:

Deed shown witness.

128 Q. Some evidence has been given as to whose handwriting that last deed is in. State whether or not that is in the handwriting of N. B. Smiley.

A. No, sir.

Q. Do you know his handwriting?

A. Yes, sir.

Cross-examination by Mr. DAVENPORT:

Q. Whose handwriting is it?

A. I think Mr. Hastings'.

Q. Who is Mr. Hastings?

A. He is in Mr. Smiley's office.

Q. He is in Mr. Smiley's office?

A. Yes, sir.

Q. A partner?

A. That I couldn't say.

Q. A clerk or partner?

A. I don't know his capacity. He is a brother-in-law of Mr. Smiley.

Q. He is in his office?

A. Yes, sir.

Q. And assists in his law business?

A. Yes, sir.

Q. And Mr. Smiley was your attorney at that time?
129 A. Yes, sir.
Q. Isn't the firm name "Smiley and Hastings?"
A. I never heard of it.

Adjourned until morning.

130 *Proceedings of July 28th, 1886.*

D. B. WIGGINS recalled for further cross-examination by Mr. ELLIOTT:

Q. In November where were you living with reference to the city of Buffalo—in November, 1883?
A. Out in West Seneca.
Q. How far from the city of Buffalo?
A. About 200 rods from the south line of the city. My place of business is in the city.
Q. At the time this contract was made your place of business was in the city and you resided out?
A. Yes, sir.
Q. What is there to fix in your mind the fact that you sent the second deed or left it with the bank to be sent to Bradford on the 28th?
A. I have no memorandum of it. My mind is refreshed from those letters, as near as I can remember it.
Q. When did you receive it from the bank first—the last deed?
A. On the 29th of November.
Q. You don't mean that; I don't apprehend. When did
131 you first receive it unexecuted?
A. That was on the 28th.
Q. How did you learn that it was at the bank?
A. I went to the bank and got it.
Q. How did you learn the fact that it was there?
A. I didn't know until I went.
Q. You didn't know until you went?
A. No, sir.
Q. Had you received any intimation that it would be there?
A. My impression is that I had; from the cashier.
Q. From the cashier of that bank?
A. Yes, sir.
Q. When did you receive that?
A. That was on the 28th.
Q. What time of day?
A. I think it was in the afternoon.
Q. How did you receive information from the cashier on the 28th that it was there?
A. A note or postal card from the bank or a messenger.
Q. Have you any recollection as to whether it was by postal card through the mail or by messenger from the bank?
A. No, sir; no positive recollection. My impression is now that I went to the bank to inquire after it.

Q. Then what did you do with it?

132 A. I kept it over night, and the next morning started for Bradford.

Q. You still don't understand me. I don't want you to make answers that you do not understand. I am asking you when you received the second deed from Bradford, unexecuted, through the bank at Buffalo.

A. That was on the 28th.

Q. That is what you said before. Now, if you made the answers you did a moment ago, understanding it to be when you received it back from Bradford, how did you receive notice from the bank at Buffalo that it was there in their possession?

A. My impression is that I went to the bank.

Q. Went to the bank after it?

A. Yes, sir.

Q. Had you received any intimation from any one that it would be there?

A. No, sir.

Q. How did you come to go to the bank after it if you did not expect it to be there?

A. Because I was looking for the money and the notes from the first deed.

Q. You think you went to the bank, then, on the 28th?

133 A. I guess I am mistaken on that date. I am mistaken on the date. It was the 26th. (Refers to memorandum:) It was acknowledged on the 27th.

Q. Now, did you receive the 2nd deed on the 26th?

Refers to memorandum.

A. Yes, sir.

Q. When did you acknowledge it?

A. On the 27th.

Q. When did you put it in the bank to send back?

A. It was certified to on the 28th and sent, according to my best recollection.

Q. And you think you received it from the bank on the 26th?

A. Yes, sir.

Q. You deposited it back with the bank on the 28th or 29th?

A. On the 28th.

Q. What time of day?

A. I couldn't say.

Q. Can you state whether or not it was in the forenoon or afternoon?

A. I don't remember.

Q. Do you remember when you got the certificate put upon it dated the 28th?

A. That was in the morning.

134 Q. Then when did you deposit this; what time in the morning was it?

A. I think about nine o'clock.

Q. Then when did you leave it with the bank?

A. My impression is right away, as soon as I got it certified.
Q. What day did you see it again?
A. On the 29th, in the afternoon.
Q. What time in the afternoon?
A. I think about three o'clock, when my Bradford mail usually gets there.
Q. Not when it generally gets there, but what is your best recollection of the actual time you received it?
A. It was about that time.
Q. Where did you get it?
A. At the bank.
Q. Who notified you it was there?
A. No one; I called for it.
Q. Was the bank open that day?
A. Yes, sir; I think so.
Q. Don't you know that was a holiday?
A. I don't remember.
Q. Don't you know the bank was closed that day?
135 A. I don't remember what day it was—what holiday it was.
Q. Wasn't it Thanksgiving in the State of New York?
A. I don't remember.
Q. Now, don't you remember whether or not the bank was closed on the 29th?
A. No, sir.
Q. If it was you probably didn't get it that day, did you?
A. I might have gotten it; they might have sent it to me by messenger.
Q. Was the bank doing business when you got it; the doors open and doing business?
A. I couldn't say.
Q. Have you any recollection about it? Who delivered it to you?
A. That I couldn't say.
Q. How did you come to go there for it?
A. I went there every day to see if there were any returns from the trade.
Q. What time did you start for Bradford on the 30th?
A. I started—I think the train leaves at 8.10 from Buffalo.
Q. 8.10 in the morning?
A. Yes, sir; and got to Bradford about one o'clock, I think.
136 Q. Now, didn't you have this deed in your possession from the time it was executed until you took it to Bradford, on the 30th?
A. No, sir.
Q. You think you deposited it in the bank on the 28th, so that it was returned on the 29th, and got it as early as three o'clock and started to Bradford on the 30th?
A. That is my impression.
Q. Do you remember who you delivered it to at the bank on the 28th?

A. I do not. I think it was the cashier.
Q. What is his name?
A. I forget his name.
Q. Did you do business at that bank at that time?
A. No, sir.
Q. Leaving Buffalo at 8.10 in the morning, what time did you arrive at Bradford?
A. I think it was about one o'clock, but I am not positive.
Q. The only other train you could take from Bradford would be late in the afternoon?
A. About six o'clock in the afternoon.

137 By Mr. DAVENPORT:

Q. Do you desire to make any explanation of any portion of your evidence yesterday?

The evidence of the witness yesterday relative to the $250 receipt is read.

A. I think I testified that that money was received as a part of the first payment, as I testified. That is the way I considered it at the time.
Q. That is, the $250?
A. Yes, sir.
Q. What did the receipt express—what was in the receipt?

Objected to.

The COURT: They only agreed yesterday that you might prove by parol that the $250 was paid. The receipt is not here, and you are not in a position to prove its contents.

Objected to, further, that it is not an explanation of anything that he has testified to.

J. M. FULLER recalled, and further examined by Mr. ELLIOTT:

138 Q. State whether any notes or money were deposited with Mr. Bell at the time Mr. Wiggins was there or subsequently upon this verbal agreement when it was made.

Objected to, that they cannot dispute the contents of their own paper, written by themselves and deposited with Mr. Bell; that they have no right to call the witness to contradict the contents of that agreement.

Def'ts' counsel propose to show that the statement of Mr. Bell which has been given in evidence was not accurate, and that every one knew at the time it was executed that it was not accurate; that Mr. Wiggins knew the money was not put in Mr. Bell's hands, and that the notes were not executed; that the paper itself shows that the notes were not then prepared and executed.

The COURT: I think they may give this evidence. It is a part of the transaction. The paper that you refer to is a paper signed by Mr. Bell. It is true that it was in the handwriting of one of the de-

fendants and written in the presence of another of the defendants, but I think it is competent for them to show what the real
139 transaction was, especially as Dr. Wiggins states, as I recall his cross-examination, that he did not see any money or notes at the time.

Mr. DAVENPORT: Then it is not to contradict Dr. Wiggins?

The COURT: Still I think it is competent to show what really took place between the parties. It relates to the time and place where this alleged contract was entered into.

Exception by plaintiffs' counsel.

Mr. ELLIOTT, resuming:

Q. As I understood you yesterday, Mr. Wiggins and yourself and Bayne were present when this transaction occurred.

A. Yes, sir.

Q. State whether any money was placed in the hands——

Objected to—the form of the question.

A. There wasn't any money placed in Mr. Bell's hands.

Q. Were there any notes placed in his hands in furtherance of this contract?

A. No, sir.

Q. Were there any executed?

A. No, sir.

140 Objected to as improper, for it may have related to something that happened when Mr. Wiggins was not there.

Objection overruled and exception by pl'ffs' counsel.

Q. You may state now whether at any time, and, if so, at what time, you gave Mr. Bell notice not to receive any deed of this property in your behalf, if you gave him notice that you would rescind the contract.

Objected to as irrelevant and incompetent.

The COURT: You are going on the theory of a delivered and accepted deed. In view of that theory we think this evidence is competent. A notice to Mr. Bell not to receive any deed, I think, would be competent. If there had been a contract here, then no notice to any one would have relieved the defendants; but we are inquiring here whether there was a completed contract; whether there was any deed delivered and accepted. I understand your theory to be that the deed was accepted and the transaction closed, and that it was taken out of the statute of frauds. Assuming that Bell had any power to accept a deed at all, I think it would be competent.
141 If there is evidence of the execution of the contract I think that would be a question for the jury. Now, is it not competent to show that if this deed was retained by Bell it was retained in violation of directions? You haven't shown, so far as I recollect, that this deed was ever in the hands of the defendants personally.

They say it never was. Two of them have testified that they never saw it until it was tendered to them, on the 30th.

Def'ts' counsel propose to prove by this witness and the other defendants that on the evening of the 27th or 28th they gave notice to Mr. Bell that they didn't propose to receive the deed and pay for the property, and that he must not receive the deed for them, and propose to show that they gave him this notice on the evening of the 27th or the morning of the 28th, before the second deed could possibly have been delivered.

The COURT: I will let you show the simple fact. What reasons they may have assigned are not admissible unless the other side wants to draw them out; but I will let you prove the simple fact, if you can do so, that the defendants gave notice to Bell on the evening of the 27th or morning of the 28th not to accept or receive this deed.

142 Exception by pl'ffs' counsel to this ruling of the court.

Mr. ELLIOTT, resuming:

Q. You may state what notice, if any, you gave to Mr. Bell on the 27th or 28th of November, 1883, in reference to receiving a deed for you.

A. I gave notice to Mr. Bell that I had been to Smiley's office——

Q. You need not state the whole conversation, but whether you gave him notice not to receive the deed.

A. Yes, sir; I gave him notice not to receive the deed.

Q. When was that?

A. That was on the evening of the 27th—the afternoon of the 27th or the 28th.

Q. That you gave him notice not to receive the deed for you?

A. Yes, sir; I told him the whole story—all that had transpired in reference to it.

Q. State whether or not the letter which has been given in evidence by Mr. Smiley to Mr. Wiggins—whether or not that
143 letter notifying him that you would not take the property was written at your direction.

A. Yes, sir.

Q. Dated November 27th?

A. Yes, sir.

Mr. DAVENPORT: It is not written on the 27th. The 29th is the day that the letter was mailed, and that was the day that it was written, and that was the date of Bell's letter.

Mr. ELLIOTT: That is your testimony. We will talk to the jury about that.

Cross-examination by Mr. DAVENPORT:

Q. Who was present when this $250 was paid?

A. Dr. Wiggins and Mr. Bayne and our book-keeper. I have no

recollection of any one else, and don't think any one else was present.

Q. How did you pay that money to him?

A. With a check.

Q. A check payable to his order?

A. Yes, sir.

Q. Did you give the check to him?

144 A. It was given to him.

Q. And he endorsed it?

A. I don't recollect about his endorsing it.

Q. You remember there was a check given?

A. Yes, sir.

Q. By whom was the check written?

A. By our book-keeper.

Q. By the cashier?

A. No, sir; the book-keeper in the office.

Q. Mr. Bell?

A. No, sir.

Q. Now, on the afternoon of the 20th, when Mr. Wiggins was there to talk to you, what papers did he have and what did he show you when you were talking about this land?

A. A letter and telegram.

Q. What other papers?

A. No other papers that I recollect of.

Q. Did he not produce a map and show to you?

A. I have no recollection of it.

Q. What do you say about your knowledge of this land?

Objected to as bearing no relation to the subjects to which his attention was called in chief.

Objection overruled, the witness being a party.

145 Q. What, if anything, was said by you as to the location of this 70 acres of land?

A. I really don't recollect about the total conversation. I knew about the locations generally of the land, but I don't recollect any conversation on that subject.

Q. What, if any, statement did Mr. Wiggins make to you about having sold the north half of it to Mr. Mullen?

A. I don't remember his speaking of selling the north half. I remember his speaking of selling a portion of his land to Tim. Mullen, I think it was, with reference to his trouble in getting his pay for it. That is all the recollection I have in reference to that.

Q. Then you knew that this land adjoined Mullen's land and Wiggins so explained it to you?

A. No, sir; I am not sure of that. I don't know that now.

Q. Didn't he explain to you that he had sold one-half of this 147 acres to Mullen?

A. I don't recollect anything about 147 acres. I remember he said he had sold some land to Tim. Mullen and had some trouble about it, and wanted to sell the rest to responsible parties.

Q. Weren't you familiar with the Mullen land and hadn't you been on it?

146 A. No, sir; I don't know where it is now.

Q. Don't you know that certain wells had been put down on the Mullen land?

A. Yes, sir; I had heard of their having one well on it.

Q. And you knew you were buying land adjoining the land on which this well was put down?

A. I didn't know the location. I didn't know where the location of the wells was relative to this property, and I don't know it to-day.

Q. Don't you know that this well was on the land bought by Mullen from Wiggins?

A. No, sir.

Q. Didn't you know there was a well on the land Wiggins had sold to Mullen?

A. No, sir. I didn't know where Mullen got this land.

Q. Didn't Dr. Wiggins tell you that he had sold to Mullen, and haven't you so sworn once?

A. Yes, sir; he told me that he had sold some land to Mullen, but I didn't know where it was with reference to this land in question.

Q. Didn't you know that the land that he had sold to Mullen was a part of the same land that he was speaking to you about?

A. No, sir.

147 Q. You didn't hear anything from him that he had sold the north half of it to Mullen, and that he had the south half of it for sale?

A. No, sir; I don't recollect any such thing as that.

Q. Weren't you and your partners operating within a very few rods of this very Wiggins tract?

A. I think within about half a mile.

Q. Had you ever been out to your property?

A. Yes, sir; frequently.

Q. Didn't you tell Dr. Wiggins that you were familiar with his land and that you knew about it?

A. Certainly I know the land from the map.

Q. Didn't you tell him that you were familiar with this land and had been upon it?

A. I had been across it a great many times. The public highway goes through it.

Q. So that you did know it; you traveled over the highway a great many times?

A. Yes, sir. Not a great many times of late years.

Q. Previous to the conversation with Wiggins, I mean.

A. Yes, sir.

Q. There was a highway crossing over it?

A. Yes, sir.

148 Q. And you had been over that highway many a time?

A. Yes, sir.

Q. Then you did know that the Wiggins property that you were talking of buying was south of the Tim. Mullen land?

A. No, sir. I don't know where the Tim. Mullen land is now.

Q. Where is the property on which this land is that you talk about as regards the location of your land?

A. I always supposed the Tim. Mullen well was on the Fox property. I didn't know that Mullen ever put down a well on what I understood to be the Wiggins property.

Q. I haven't intimated anything about Wiggins putting down a well. I am talking about this well which you knew was put down on the Mullen land, which Wiggins formerly owned.

A. I don't know that Wiggins formerly owned it. I know there was a Mullen well, but I always assumed it was not on the Wiggins land.

Q. Where is that well?

A. North and west of the ruins of that old Mead mill. The old Mead mill ruins are, I suppose, on Dr. Wiggins' lot.

Q. You were acquainted with that mill for many years?

A. Yes, sir.

149 *A. Yes, sir.*

Q. And knew that it stood on the 70 acres you were talking of buying?

A. No, sir; I didn't know that.

Q. Didn't you know you were talking of buying the land that the road run through?

A. Yes, sir.

Q. Then didn't you know that the mill was on one side or the other side of that road?

A. I knew at the time Dr. Wiggins was talking to me about it.

Q. I am talking of the conversation between you and Dr. Wiggins. Didn't you know at that period that that old saw-mill was upon that 70 acres?

A. I did not. I asked Dr. Wiggins if I could get the stone there. I wanted to know if I could have the stone of the old ruin; if they were his in the first place; and, if so, if I could have them to put a boiler on the other property half a mile away.

Q. Now, when you asked him that question what reply did he make to you?

A. He said that they were no use to him; that he didn't care about it. We were putting up a 60-horse boiler was why I wanted the stone.

150 Q. Did you take the stone off from it?

A. No, sir.

Q. Now, was there anything of that sort said in your conversation with Dr. Wiggins on the 20th of November, with reference to stone?

A. I think it was the first time that I saw him. It may have been the next day. I remember having a talk about the stone, as showing that I didn't know whether this mill was on his lot.

Q. On the 20th of November was there a word said by you about stone to Dr. Wiggins?

A. I will not be sure whether it was that day or the next day. It must have been one of those days.

Q. Was there anything said by him to you about stone on the next day?

A. It must have been on one of those two days.

Q. Wasn't your boiler up and running long before that time?

A. Now, I assume this——

Q. Answer the question and then explain afterwards.

A. I cannot tell you.

Q. Then you say you cannot tell whether that boiler was put up long before that period or not?

A. My impression is that it was not.

151 Q. Wasn't it put up before November 20th, 1883?

A. I should think not. If I did see Dr. Wiggins before I might have spoken to him about it. I don't think I saw him before that year. I assume it was that day because I don't recollect seeing him before that time. I remember the conversation about the stone. If I had seen him before I would probably have spoken to him about it.

Q. Then you are not sure that you did say anything about the stone on the 20th of November?

A. No, sir; I am not sure.

Q. Previous to that you knew that he owned the land where this mill was?

A. No, sir; I didn't know that.

Q. Why did you ask him for the stone?

A. That is the reason why I asked him. I asked first if the ruin of that old mill that I had known for twenty years was on his land. If I saw Dr. Wiggins prior to November 20th I would have been as likely to have asked him that question before, but I don't think I saw him, and consequently place it at the time this conversation took place. I have no recollection of seeing Dr. Wiggins for probably a year before.

Q. Have you the receipt for $250 with you?

152 A. No, sir.

Q. Is it here in the city of Erie?

A. I don't know. I have never seen it, and do not recollect the receipt at all.

Q. You don't remember ever seeing it?

A. No, sir.

Q. Do you remember seeing a receipt written that day?

A. I don't remember that there was a receipt given. I know there was a check, but I haven't the slightest remembrance of any receipt being given.

Q. You don't remember Mr. Bayne writing the receipt?

A. No, sir.

Q. Never saw the receipt?

A. No, sir.

Q. There was no receipt written and delivered in your presence?

A. I have no recollection of the receipt at all.

Q. Was there any receipt written and given to Mr. Wiggins in your presence?

A. I have no recollection of any.

Q. And you haven't seen any since?
A. No, sir; I have not.
Q. I think I asked you if Dr. Wiggins didn't produce a map?
153 A. Yes, sir; I have no recollection of any map at all.
Q. On the 20th of November?
A. No, sir.

S. G. BAYNE recalled for further examination by Mr. ELLIOTT:

Q. You are one of the defendants?
A. Yes, sir.
Q. At the time that Mr. Wiggins and Mr. Fuller and yourself went down to the bank and had the interview with Mr. Bell, state whether, at the time that paper was signed by Mr. Bell or at the time of the interview between yourselves and Dr. Wiggins, any money or notes were placed in the hands of Mr. Bell.

Objected to for the same reasons as the same question asked the other witness, and objection overruled. Exception by pl'ffs' counsel.

A. There were no notes written and never have been, and no money was deposited.
Q. State whether or not you heard the letter read from Mr. Smiley to Mr. Wiggins, that was offered in evidence by the other side yesterday.
154 A. Yes, sir.
Q. You may state whether that letter was written to Mr. Wiggins by directions of yourself and Mr. Fuller.
A. Mr. Fuller and I went to Smiley's office and told him to write the letter.
Q. On what day of the month?
A. On the 27th of November, 1883.
Q. State whether, either on the evening of the 27th or the 28th of November, 1883, you gave any notice to Mr. Bell with reference to receiving a deed from Dr. Wiggins for the property in controversy.
A. I did. I gave him notice not to receive it and not to pay any money on it; either on the evening of the 27th or the forenoon of the 28th.
Q. With reference to Thanksgiving Day, do you remember what day was Thanksgiving Day?
A. The 29th, I understand it to be.
Q. Was the notice given before that day or on that day?
A. I am positive it was before it.
Q. State whether or not the bank was open on Thanksgiving.
A. No, sir; it was not; it was a holiday.

155 Cross-examination by Mr. DAVENPORT:

Paper signed by W. W. Bell shown to witness.

Q. I believe you wrote that paper?
A. Yes, sir; that is my handwriting.
Q. What other paper did you write?
A. I don't recollect writing any other paper.

Q. You wrote another paper?
A. I don't think I did; I don't recollect it; I don't believe I ever wrote any other paper.
Q. Have you any other paper than this relative to this transaction?
A. Not a single scrap.
Q. Never have had?
A. No, sir; never have had.
Q. Are you interested in any oil territory near this property?
A. I am not now.
Q. Were you previous to November 21st, 1883?
A. Yes, sir.
Q. How near to this property?
A. I never was on this property but once. I have been pointed out this Wiggins tract from a distance, but I may have crossed
156 it on the road; but if I did I didn't know it. Mr. Fuller is the man that attended to the wells principally. I visited the property once and did not know our own property or the lines of it.
Q. You knew that the road passed through it?
A. Not until this trial commenced. It is only by hearing it here that I know it.
Q. You never saw the property?
A. It was pointed out to me by Mr. Fuller from a distance on the hill at one time when I visited the property, and that is all that I can say about it. I am not familiar with it.
Q. Didn't you know that this was a portion of a tract, a part of which had been sold to Mullen?
A. I didn't know anything about it.
Q. Wasn't there anything of that kind said?
A. Not in my presence.
Q. Fuller didn't explain anything about it to you?
A. Not of that nature.
Q. What did Fuller tell you about it?

Objected to as not cross-examination offered as bearing on the subject of this tax title.

Q. On the 20th what, if any, conversation did you have
157 with Fuller about this property?
A. He explained to me, as far as I recollect, that this property was in the line of developments and would probably turn out to be oil territory.
Q. What did he say to you about the Mullen tract?
A. I don't recollect that he said anything about it.
Q. What, if anything, did he say to you about any well being put down near this property—on the adjoining piece?

Objected to as not bearing on the question of the tax title. Overruled.

Q. What did Mr. Fuller tell you about the location of this 70 acres which he was talking with Mr. Wiggins about buying?

A. That it was in the line of developments and might be good oil territory.

Q. Anything else?

A. I don't recollect anything else.

Q. How long is the line of oil territory in that section?

A. It runs from Canada to Alabama.

Q. He said nothing as to what part of this line of oil developments from Canada to Alabama this oil territory was in?

158 A. No, sir; his boundaries were smaller than that, however, but I don't recollect any defined locations that he gave. I was independent of Mr. Fuller's judgment, because I had seen it.

Q. He told you it was near your place where you were putting down wells?

A. We had 45 or 50 wells there near Lafayette.

Q. How near did he tell you it was to it?

A. I don't recollect that he said anything about distance at all.

Q. Did he use the word "near?"

A. Yes, sir; I think he said it was in the line of developments.

Q. Was it between your property and the developments on the other side?

A. It was in the line of the general 45 degree line of development northeast and southwest.

Q. Your territory which was near it was on which side of this property?

A. I couldn't tell you. I don't know my own territory, for I never was on it but once. I have owned fifty wells that I have never seen.

Q. You do know it was either on the south or north half or east or west?

159 A. No, sir; I wouldn't know the points of the compass out there in the woods in a strange country. I never was there more than two hours.

Q. You were buying it on the strength of what Mr. Fuller knew?

A. No, sir; not entirely. I believed from general report that it might turn out to be oil territory.

Q. If you didn't know anything about the location of it, how could you know anything from general report?

A. I have frequently bought territory in that same way. I took my interest in this in that way.

Q. Then you did have some idea of its location from general report?

A. Yes, sir; but when you get down to details I knew absolutely nothing.

Q. Did you know anything about any well adjoining or near this property?

A. By general report, I did.

Q. How near, by general report, did you suppose this well was to this?

Objected to as improper.

Q. Who was putting down a well near this territory?
160 A. Report said it was T. N. Barnsdell.
Q. What conversation did you have with T. N. Barnsdell about this well that he was putting down?

Objected to and sustained.

A. I had no conversation with him.
Q. You had no conversation with him about the location of that well which he was supposed to be putting down?
A. No, sir.
Q. And you had no idea from him as to how near this proposed 70 acres that you were going to buy—this proposed purchase of 70 acres—this well which was going down was?
A. No, sir.

By Mr. ELLIOTT:

Q. State whether or not Dr. Wiggins knew that no money or notes were put in Bell's hands at the time.

Objected to as incompetent.

Q. When you went into the bank at the time this paper was drawn was Dr. Wiggins with you?
A. Yes, sir.
Q. State whether or not he was in a position after you had
161 the conversation in your office and went to the bank to know whether the money was placed in the hands of Mr. Bell.

Objected to and objection sustained.

Q. Were you in his presence? State whether or not you were in his presence all the time from the time you left his office until the transaction was over.
A. He didn't get away from me more than two or three yards in the whole time.

By Mr. DAVENPORT:

Q. What position do you occupy in the bank?
A. President of the bank.
Q. Who is the cashier?
A. W. W. Bell.
Q. What position does Mr. Fuller occupy?
A. Vice-president.

W. W. BELL recalled for further examination by Mr. ELLIOTT:

Q. Some question was asked you yesterday by counsel for
162 the plaintiff in reference to the deed. (Deed dated November 26th and acknowledged the 27th shown to witness.) Something was asked you yesterday as to when you received that deed. State whether you ever received that deed after it was executed.
A. No, sir.

Q. When was the first that you ever saw it after it was executed?

A. When Dr. Wiggins brought it in.

Q. At the time you speak of, when Mr. George was there with him?

A. Yes, sir.

Q. To what have you reference in that letter, to which your attention was called yesterday, dated the 29th?

A. The first deed; it refers to the first deed.

Q. The 29th of November?

A. Yes, sir.

Q. State whether on the evening of the 27th or the morning of the 28th of November, 1883, you received any notice from Mr. Bayne or Mr. Fuller in relation to receiving the deed from Mr. Wiggins.

A. I was told on either the 27th or the 28th not to receive the deed or pay the money out; that there was some hitch in the business.

163 Q. Just the fact as to whether notice was given you not to receive the deed or pay any money.

A. Yes, sir.

Q. The attention of Mr. George was called to a conversation with you in reference to why you sent the deed back, in the conversation which is alleged to have occurred on the 30th of November. State whether you informed him at that time that you had sent this last deed back. State whether on the 30th of November, 1883, you told Mr. George that you had sent back the deed which you hold in your hand.

A. No, sir.

Q. Did you make any statement about sending back the deed to him?

A. I think probably that I did.

Q. To what deed did your statement have reference?

A. To the first deed.

Q. State whether any money or notes were placed in your hands in pursuance of that statement that you signed.

Objected to as before; overruled, and exception.

A. There were no notes ever placed in my hands and no specific money.

164 Cross-examination by Mr DAVENPORT:

Q. What first passed between you and Mr. George when you saw him on the 30th of November, 1883?

A. I don't remember.

Q. What conversation took place between you and Mr. George, in the presence of Mr. Wiggins, on the 30th of November, 1883?

A. I cannot tell.

Q. Can you state any part of the conversation?

A. I cannot. I was not positive that Mr. George came in with Mr. Wiggins until Mr. George made the statement himself.

Q. You were not positive that Mr. George came with Mr. Wiggins to see you until Mr. George testified?

A. I was not positive.

Q. Then you haven't any recollection as to what was said by Mr. George on the 30th of November, 1883?

A. No positive recollection.

Q. Did you not yesterday have a conversation with Mr. George and myself, I holding this deed which you now have, and I asking you whether that was the deed that — sent back by your letter of the 29th of November, 1883?

A. I think you asked me that.

Q. What reply did you make?

165 A. I didn't think it was.

Q. You said you didn't think it was?

A. I didn't think it was, as I remember it.

Defendant rests.

Pl'ff's counsel now offers in evidence the sheriff's deed, the deed of Wiggins and wife dated November 22nd, 1883, and the deed of Wiggins and wife dated November 26th, 1883; all of which are received.

D. B. WIGGINS recalled, and further examined by Mr. DAVENPORT:

Q. In you conversation with Mr. Fuller on the 20th what, if anything, was said by you as to the location of the 70 acres?

A. I said to him that this land was the southern portion of the lot 147 acres; that the north part had been sold to Mullen.

Q. What, if anything, did he say as to his acquaintance with the land?

166 A. He said that he knew the location, because he was operating in the immediate vicinity.

Q. What, if anything, was said by him in this conversation about the Mead mill and the stone?

A. There was nothing said at that time.

Q. When, if at any time, was there any conversation between you and Fuller?

A. I think it was some time before that. I cannot recollect the exact time, but it was some time before that.

Q. Now, in your conversation, what, if any, map did you produce and show to Mr. Fuller?

A. I showed him the map which I have here.

Mr. Davenport produces the map and shows it to the witness.

A. That is the map.

Q. Is the map to-day just as it was then?

A. Yes, sir.

Q. Any changes upon it in any way?

A. No, sir; not that I can see.

Witness explains the map to the court and then to the jury.

Q. Please explain where the 250-acre tract is about which

167 they have been testifying. The 250-acre lot is located where?

Witness points it out.

Q. Is it in any way connected with the 70 acres which you sold?
A. No, sir; there is a small peninsula between them.
Q. The tract on the north is No. what?
A. No. 3433.
Q. And the south?
A. 3432.
Q. And this over here?
A. 2455.
Q. And the 70 acres, that is all in this warrant?
A. Yes, sir.
Q. That is all in which?
A. 3432; that is the land that I sold to Bayne, Fuller and Melvin.

A JUROR: I would like to ask—there is a number here corresponding with that one on those tax titles, and I would like to ask where the locality is with respect to the locality of the land sold to these defendants?

MR. DAVENPORT, resuming:

168 Q. Please explain to the jury the location of the 250 acres, one-fourth of which you sold at one time and was sold at treasurer's sale.

Witness points it out, being in 2255.

A. This southern portion of it, one-quarter, was sold for taxes. It is in 2255.
The COURT: That has nothing to do with this piece?
A. No, sir; it is entirely separate.

MR. DAVENPORT, resuming:

Q. In what tract alone lie the seventy acres you speak of?
A. The southern portion of this 147 acres.
Q. And lies in which tract?
A. 3432.
Q. The entire 147 acres lie in which tract?
A. 3432. A small portion lies in 3433.
Q. The red line being the dividing line?
A. Yes, sir; the most of it is in 3432.
Q. This map was present and shown by you to Fuller?
A. Yes, sir.

169 Q. Did you show him where Mullen's land runs, and does the map itself have Mullen's name on? That shows the whole 147 acres you had owned?

A. Yes, sir; and I stated that the northern part of it was the land I sold to Mullen and the southern part of it was the land I wanted to sell.
Q. What did he say to you at that time about his being familiar with this seventy acres of land?
A. He said they were operating largely in that immediate vicinity, and that he knew of the location.

Q. Now, to go to the land which he is operating in any direction he would have to go over the road that runs through this seventy acres?

Objected to as leading, and sustained.

Q. In going to the land which they were operating upon through what portions of the seventy acres would he be obliged to pass if he went by way of the turnpike road?

A. His land lies between the land that I sold and Bradford. He would have to go to my land. He goes up the Turnip Run road, but not quite to my land.

Q. His land lies between Bradford and this land?

A. Yes, sir, if I rightly understand where his land is, and I think I do.

170 Cross-examination by Mr. ELLIOTT:

Q. You didn't call attention to any other land than the tract you were undertaking to sell?

A. I didn't have any other.

Q. Did you call attention to any other tract than the one you were undertaking to sell to Fuller?

A. I called his attention to the land, the southern half of this 147 acres.

Q. But you didn't call his attention to any other land save the tract you were undertaking to sell him?

A. The northern portion of this land I told him I had sold to Tim Mullen.

Q. That is the one tract upon this map that you called his attention to?

A. I think it was.

Q. Did you show this map to Mr. Bayne also?

A. No, sir; he was not present.

Q. When was it that you showed this to Mr. Fuller?

A. On the afternoon of the 20th.

Q. In his office?

A. Yes, sir.

171 Q. When was it that you had the conversation with him with reference to the stone?

A. That I couldn't say; it was quite a long time previous to this.

Q. That was with reference to the stone at the mill, where the mill formerly had been?

A. He asked me if he could go there and get some stone at the mill.

Q. That was the mill that was called the Mead mill?

A. Yes, sir.

Q. It is a lot in which Mead formerly had an interest?

A. Yes, sir.

Q. The mill is on the 147-acre tract?

A. It was on the north side of the road; yes. sir.

Pl'ffs' counsel now offers in evidence this map to which the witness has referred.

Objected to, that it has not been shown to be accurate.

The COURT: The witness has testified that it was before the parties and was referred to.

Map received in evidence.

172 By Mr. DAVENPORT:

Q. Where is the tract—the 250-acre tract—a part of which was sold for taxes?
A. On the south of this lot.
Q. It is marked out on the map and you have shown it to the jury?
A. Yes, sir.
Q. No part of the 147 acres?
A. No, sir; entirely separate.
Q. Was there any part of the 147 acres sold for taxes?
A. No, sir; never.

By Mr. ELLIOTT:

Q. How do you know that?
A. I should be apt to know it, I guess. I don't think it would have been in my possession or my wife's possession if it had been sold for taxes.
Q. You mean that you claim title to it?
A. Yes, sir. I can explain that other sale if it is necessary.

173 JAMES GEORGE recalled, and further examined by Mr. DAVENPORT:

Q. I wish you to state what was said by Mr. Bell when this deed was shown to him in your presence (meaning the last deed).
A. Yesterday after court adjourned Mr. Davenport asked Mr. Bell, standing at that table—we three were together—what deed this letter referred to, and he said it was the last deed (meaning letter of the 29th). Mr. Davenport had the letter and deed both in his hand.

Cross-examination by Mr. MORRISON:

Q. That was here yesterday at the counsel table?
A. Yes, sir.
Q. During the progress of the trial?
A. After court had adjourned at noon.
Q. Before you got out of the court-room?
A. Yes, sir.
Q. What did Mr. Bell say? Give his words, if you can.
A. Mr. Davenport asked him what deed that letter referred to, showing him the letter of Nov. 29th. He said it was
174 the last deed. Mr. Davenport had the deed in his hands, and says, "Is this the deed?" and he says, "Yes; that is the deed."

Q. Did you arrange to have him come up there and Mr. Davenport question him and you listen to be a witness?

A. No, sir; they had been conversing some time, and I went after my hat and got it and came back by the table, and they were talking there, and I heard this. Dr. Wiggins was close by, but I don't think he heard it.

Q. Was there anything else said about this first deed?

A. I think not; not that I heard at that time.

Q. You stated yesterday that you had been attorney in this case since it commenced?

A. Yes, sir.

Q. Brought the suit?

A. Yes, sir.

Plaintiffs rest.

175 R. H. THAYER recalled for further examination by Mr. DAVENPORT in regard to something which was omitted:

Q. Did you hear the testimony of Mr. Bayne yesterday in which he testified that he had stated to you that Dr. Wiggins had made a verbal sale to him?

Objected to, that he has been interrogated in regard to this, and that Mr. Bayne was called to contradict him.

Mr. DAVENPORT: Mr. Bayne testified that he had made a verbal bargain with Dr. Wiggins. We want to show by Mr. Thayer that he never used the word "verbal" at all, but did say that he had made a bargain.

The COURT: I think the witness was interrogated as to this statement yesterday and Mr. Bayne was called to contradict him, so that you have the statement of both witnesses now.

Proofs closed.

176 *Charge of the Court.*

GENTLEMEN OF THE JURY: The foundation of this action is an alleged parol contract entered into between the parties on the 21st of November, 1883. If the testimony is believed (and it is uncontradicted) the plaintiff, D. B. Wiggins, the husband of the other plaintiff, and two of the defendants—Mr. Bayne and Mr. Fuller—met at Bradford on the 21st of November, 1883, and there they entered into what is called in the law a "parol" contract, a term which is used in contradistinction to a written contract. The terms of that contract and the stipulations would seem to be embodied in a receipt which the evidence tends to show is in the handwriting of one of the two defendants I have named and written in the presence of the other of those defendants and signed by W. W. Bell. That receipt sets forth—I will read it, because, as I have already indicated, it seems to embody what was the parol contract between the parties. You, of course, understand that this receipt does not satisfy the statute of frauds, because it is a receipt signed by a party who is a stranger to the contract.

177 (Reads:)

"BRADFORD, PENN'A, *November 21st*, 1883.

Received $4,750 from Bayne, Fuller and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000, the balance to be paid in notes and money as agreed on by both parties. I am to remit this money and the notes spoken of to the said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 at three months, $2,500 at six months, both with interest.

(Signed) W. W. BELL."

There is in force in Pennsylvania a statute known among lawyers (and I may say among laymen, too) as the statute of frauds and perjuries, and it provides in effect that a contract for the sale of land by parol—and I have already explained to you what that means, a contract not in writing signed by the parties—is void; or, perhaps, to speak more accurately, is not enforcible. It is not enforcible in this sense: That a party to such a parol contract for the sale of land cannot be compelled specifically to perform it. A bill in equity would not lie to compel the specific performance of such parol contract; neither can the contract be enforced by an action at law. The party would recover the whole fruits of the contract, because
178 that would practically repeal the statute. But notwithstanding the law is such, for the breach of such parol contract to sell land an action lies to recover damages. Now, I am thus particular in explaining to you the law because this case presents a double aspect. There are in the declaration which the plaintiff files setting forth his cause of action what are called three counts, and the cause of action is set forth in different modes so as to meet the proofs. Two of those counts proceed for the recovery of damages for the violation of this contract. The third count is for the recovery of the contract price, and that is in affirmance of the contract. The counts are not inconsistent at all, and the plaintiffs, suing as these plaintiffs do, may declare in that way. But what the verdict should be, of course, depends upon the evidence.

In regard to the two first counts of this declaration—the counts which go for damages—I have only to say this: that if you are satisfied that this parol contract was entered into and repudiated by the defendants and performance refused without justification, and there is nothing more in the case, the plaintiff would be entitled to recover damages. There is, however, in this case no evidence
179 of any special damage which the plaintiffs have sustained. As I have already explained to you, if damages are awarded to the plaintiffs it could not be the contract price of this land as damages, because that would be to enforce the contract. I do not recall any evidence of special damages to the plaintiffs. There is some evidence of a trip to Bradford which Dr. Wiggins, perhaps, was justified in making. But even the expenses of that trip are not before you or any other expense that he may have incurred in executing the deeds. In any view, however, if you are satisfied that there was such a parol contract and an unjustifiable breach of it on

the part of the defendants, the plaintiffs would be entitled to nominal damages at the least. The great question in this case, however, is whether there was such an execution of this contract as would take it off the statute of frauds and perjuries, or rather such an execution of the contract as would be a compliance with that statute.

It is alleged that that is the fact. It is alleged on the part of the plaintiffs that the contract was so executed on the part of the plaintiffs that they are entitled to recover the contract price of this land upon the footing of a completed contract. That is the great question in the cause, and the question that has engaged the attention principally of the learned counsel who have tried the cause.

180 It is in evidence that a deed bearing date November 22nd, 1883, was executed in the State of New York by the two plaintiffs, Dr. Wiggins and his wife, and was transmitted to Mr. Bell, the party signing the paper I have read to you, and that that deed was retained for some days—perhaps until the 29th of November. I am not quite accurate in my recollection as to dates. The evidence is that such a deed was executed and transmitted to Mr. Bell. About the 27th of November—I think that is the date (and if I am in error as to these dates I hope the counsel will correct me as I go along)—Mr. Bell wrote a letter to the cashier of the bank at Buffalo, through whom Dr. Wiggins was carrying on this correspondence, stating that he enclosed a new deed which the counsel of the defendants desired should be executed to take the place of the first deed, and there is evidence that that deed was executed on the 27th of November, 1883. Perhaps there is some slight evidence in the case that that deed was transmitted through the bank at Buffalo to the bank at Bradford, or to Mr. Bell, rather, although Mr. Bell, perhaps, states that he has no recollection of receiving it, and Mr. Fuller and Mr. Bayne state that they never saw it until it was tendered on the 30th of November. If it was transmitted through the bank of Buffalo on the 28th of November it was immediately returned to Buffalo

181 and doesn't seem to have been held any time at Bradford. About that time Mr. Smiley, who seems to have been the attorney of the defendants, wrote the letter to Dr. Wiggins that has been read to you. That letter bears date November 27th, but seems to have been postmarked on the 29th, and it is argued that it was really written on the 29th. That is a matter for you. It is alleged that that view of the subject finds confirmation in the date of the letter which Mr. Bell wrote on that day.

On the 30th of November Dr. Wiggins came to Bradford and there is evidence that he tendered to Mr. Fuller and Mr. Bayne this second deed. I have, gentlemen, merely run over this testimony in a hurried way. I do not pretend to recite it at length because it has been given in your hearing so recently that I dare say you remember the substance of the testimony in the case.

I have already explained to you that before the plaintiffs can recover on the footing of a completed contract, before they can recover the purchase-money, they must satisfy the jury from the whole evidence that one or the other of these deeds or both of them were accepted by the defendants. If a contract be in parol and the deed is

executed on the footing of the contract and is delivered and
182 accepted, why that, of course, takes the case out of the statute of frauds, or, to speak more accurately, fulfils the requirements of the law, and the purchase-money could be recovered. The transaction then rests no longer in parol, but as a consummated contract the purchase-money could be recovered. Now, whether or not there was such a consummation of this contract is a question which I submit to you. You will determine it upon all the evidence in the case. I do not mean to even indicate any opinion that I may entertain myself upon that subject. It is for you to decide what the fact is under the evidence.

Before I proceed to read and answer the points which counsel have submitted it is proper that I should advert briefly to the tax sale. There is evidence in the case which the court admitted tending to show and showing that there was a tax sale of a piece of land in La Fayette township, McKean county, and there are some circumstances of identification which the court thought ought to be submitted to the jury. You have heard, however, the testimony of Dr. Wiggins upon that subject and the explanation that he makes as to what property was really sold under that tax sale and what occurred, as he states, when this parol contract was entered into; that the
183 map was shown the parties and what was said. You will take that matter into consideration and determine whether his explanation is the correct and truthful explanation of that sale. If it is it would relieve the title of the imputed flaw.

The defendants' counsel ask me to charge you, 1st, the contract for the sale of the premises described in the plaintiffs' declaration being in parol, and there being no evidence that any possession thereof was taken by the defendants under and in pursuance of the contract, there can be no recovery of the purchase price by the vendor unless the contract was fully executed by the delivery of a good and indefeasible deed for the land, accepted by the vendees.

The answer of the court to that point is this: This point is affirmed, with this qualification: that if the first deed—the one of November 22nd, 1883—was accepted by the defendants, and at their request the plaintiffs, on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller,
184 this was a sufficient execution of the contract, notwithstanding the first deed was defective.

2nd. That until such delivery and acceptance the arrangement rested entirely in parol and was ineffectual to pass the title to the land to the vendees and render them liable to the vendor for the purchase-money by reason of the statute of frauds and perjuries.

This point is affirmed, with the qualification expressed in the answer to the first point, and that I will again read you: This point is affirmed, with this qualification: that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs, on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on

November 30th, 1883, said second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective.

The first deed was undoubtedly defective, and very seriously so. Notwithstanding, if you find from all the evidence that that deed was accepted by the defendants and that they called upon the plaintiffs to execute a more perfect conveyance, and that was done
185 and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law.

3rd. If the defendants agreed in parol that the money and notes which were to be the consideration of the purchase should be delivered by Bell to the plaintiff on receipt of the deed from her, the defendants had the right to rescind the agreement at any time before the receipt by Bell of such deed and the delivery of the money and notes to her.

This point is affirmed, with the explanation that a rescission so effected would leave the defendants liable to an action for damages—that is to say, this contract being a parol contract, at any time before it was consummated the defendants had a right to notify Bell neither to accept the deed nor to transmit the money and notes, subject to their liability to an action for damages, such damages as the plaintiff might sustain.

4th. If no notes or money were placed in the hands of Bell at the time of or subsequent to the alleged agreement by Fuller and Bayne that the deed should be forwarded to him, Bell, and the money and notes be delivered to the plaintiff in payment of the consid-
186 eration, and it was so known and understood by Wiggins, then there was nothing done by Bayne and Fuller towards an execution of the contract on their part, and they had a right and were at liberty to rescind it by notice to Bell not to receive the deed.

This point is affirmed, with the explanation I have already given, that it would leave them open to an action for damages.

5th. That the notice to Bell by Bayne and Fuller not to pay the money and deliver the notes at any time before the receipt of the deed by him and before the delivery of the money and notes was a rescission and would relieve the defendants from any liability to the plaintiffs for the purchase price.

This point is affirmed. The contract being a parol contract, at any time before it was consummated the defendants might be off from it, subject to their liability to be sued for a breach.

6th. If Wiggins agreed with Bayne and Fuller to convey to the defendants land the title to which was in his wife, without
187 disclosing her ownership, they had a right to refuse to execute the contract on that account when they learned that fact.

This point is refused.

7th. If the agreement for the sale was in fact made by and for the wife of Wiggins, the defendants were under no obligations to execute it and incurred no liability either for the purchase-money or

damages for refusing to execute it, because of the absence of mutual obligation and remedy.

This point is refused.

8th. If T. J. Melvin, one of the defendants, did not agree to or place in the hands of Bell any money or notes to be delivered to the plaintiffs, and did not agree that the deed for the premises should be forwarded to him, and did not subsequently ratify said arrangement, he is not bound by it, and no recovery can be had against him, and as this action is founded on an alleged joint liability of all the defendants, there cannot be any recovery against them or either of them.

This point is affirmed. It assumes that Mr. Melvin neither
188 originally was a party to this agreement nor subsequently acquiesced in or ratified it, and if that is the case the point is good law.

9th. There being no tender of the deed to Melvin, then there is no execution of this contract by the plaintiff as to him. He is not liable for the purchase price either individually or jointly with Fuller and Bayne, and the verdict should be for the defendants.

(Answer.) This point is refused. If Mr. Melvin subsequently acquiesced in or ratified this contract, of which there is some evidence, in my judgment, a tender to him individually was not necessary. When I say "some evidence, in my judgment," I mean some evidence to go to the jury. I do not mean to intimate any opinion on the effect of that evidence.

10th. There is no evidence to submit to the jury that Melvin agreed to make the purchase with Bayne and Fuller or subsequently ratified it or had any knowledge of such an arrangement before the commencement of this suit.

This point is refused. That is not my recollection of the evi-
dence, but what the testimony is upon that point is exclu-
189 sively for you. All that I say is that it is for you to decide that, and not the court, and I therefore decline the point.

11th. If the plaintiff's title was doubtful or attended with circumstances unknown to the defendants at the time of the alleged purchase which would probably involve them in a lawsuit, they were at liberty to rescind.

That point is affirmed.

12th. That under the pleadings in the case the plaintiff is bound to show a good title to the premises as vested in her, and, not having so shown, she cannot recover in this case.

This point is refused.

The last and 13th point relates to the subject of damages, and perhaps I have said all on that subject that is necessary, but I will read it:

13th. That the measure of damages for refusal to execute a parol contract for the sale and purchase of land is money paid and expenses incurred when the action is brought by the vendee and the expenses incurred by the vendor when the action is brought by him, in the absence of fraud, of which there is no evidence in this case.

190 That point is affirmed. The latter part of the point means there is no evidence of any fraud in this parol contract. The refusal of the party to execute a parol contract is not of itself fraud.

These answers, gentlemen, with what I have already said to you, it seems to me, cover the case. I will merely recapitulate that the claim presents a twofold aspect—one for damages for the breach of the parol contract, and the other for the recovery of the purchase-money on the footing of a consummated contract. If the contract was not consummated, so that the case was resolved into one of damages, I have already said that under any view of the case the plaintiff would be entitled to nominal damages. The other aspect of the case is the one in which the claim is for the purchase price of this land, and whether or not the jury find the contract price will depend upon your finding of the fact, which I have submitted to you, of whether this contract ceased to be in parol and became a consummated contract by the acceptance of one or the other or both of those deeds.

I do not think it necessary to answer the points of the plaintiff more specifically than answered in the general charge.

191 The statement of claim of counsel for plaintiff is sent out with the jury.

The COURT: You will bear in mind, gentlemen of the jury, that that is not evidence, but is only perhaps to refresh your recollection as to dates, if you have any occasion to refer to dates.

Defendants' counsel, before verdict, except to the answers of the court to the 1st, 2nd, 6th, 9th, 10th, and 12th points of the defendants and to that part of the charge covered by the answer to the first and second points as connecting the two.

Let these exceptions be filed.

M. W. ACHESON, *Judge.*

The court before adjournment states that the counsel may at any time within four days after the return of verdict make and file a motion for a new trial in the same form and with the same effect as if the court were in session.

192 In the Circuit Court of the United States for the Western District of Pennsylvania.

D. B. WIGGINS & JANE M. WIGGINS, His Wife, in the Right of Jane M. Wiggins, *vs.* S. G. BAYNE, J. M. FULLER, and THOMAS J. MELVIN.	No. 4. July Term, 1885. Trial at Erie, Pa., July, 1886.

Specifications of Error on Part of Plaintiffs in Error.

On the trial of the issue in this cause in the court below the court erred in its rulings as set out in the bill of exceptions in this case, which are as follows:

First Bill of Exceptions.

Upon the trial of the issue in this cause the plaintiffs offered in evidence a certain instrument in writing in words and figures as follows, to wit:

"BRADFORD, PENN'A, *Nov.* 21*st*, 1883.

Received $4,750 from Bayne, Fuller, and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000, the balance to be paid in notes and money, as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 at three months, $2,500 at six months, both with interest.

(Signed) W. W. BELL, *Cashier*."

To the foregoing offer defendants objected in words as follows, to wit:

"Objected to as incompetent and irrelevant under the pleadings in this case."

And further objected to by defendants as follows, to wit:

"Objected to as irrelevant and immaterial, and also that all the defendants were not present at the time it was executed."

The court overruled the objections and admitted the paper in evidence in words as follows, to wit:

193 "This is a part of the transaction, and two of the defendants, at any rate, were connected directly with it, and it seems to me that it is admissible in evidence. What the effect of it may be — will see further on."

To which decision of the court the defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

Second Bill of Exceptions.

Upon the trial of the issue in this cause the plaintiffs offered in evidence an instrument in writing, purporting to be a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 27, 1883.

"E. W. Hayes, Esq., Cas.

"DEAR SIR: I enclose a deed that Bayne, Fuller & Melvin's att'y wishes executed in place of the one sent by you, on receipt of which I will forward money, notes, and old deed.

"Yours truly, W. W. BELL, *Cas.*

"This is a Pa. form and the other is a N. Y. one."

And at the same time, and in connection with above-mentioned letter, the plaintiffs also offered in evidence another instrument in writing, and also purporting to be a letter from W. W. Bell to the

cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 29, 1883.

"E. W. Hayes, Esq., Cas.

"DEAR SIR: By request of Bayne, Fuller & Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins giving the reasons for so doing.

"Yours truly, W. W. BELL, *Cas.*"

194 And at the same time, and in connection with the two letters last above mentioned, the plaintiffs also offered another instrument in writing, and purporting to be a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 24, 1883.

"E. W. Hayes, Cas.

"DEAR SIR: Yours of 23d inst. at hand. The search is taking longer than expected, but will probably be completed by Monday.

"Yours truly, W. W. BELL, *Cas.*"

To the foregoing offers of the three letters above described defendants objected in words following, to wit:

"Objected to as being simply a declaration of Mr. Bell and not binding or affecting the defendants in any way."

Defendants further objected to said offers in words following, to wit:

"Def'ts' counsel object to all the letters as incompetent against the defendants; that they are at most but declarations of this witness."

The court overruled the objections and admitted the letters in evidence.

The court used the following words in making above ruling, to wit:

"I don't see that he says anything in this correspondence that is against the defendants—anything more than he explains the transactions as they occur. I think that is about all there is of it. One of the letters, I understand the witness to say, was written at the request of the defendants. I think I will receive these letters."

To which decision defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

In which ruling defendants respectfully submit the court erred.

195 *Third Bill of Exceptions.*

Upon the trial of the issue in this cause the plaintiffs offered in evidence a certain instrument in writing, purporting to be a letter from E. W. Hayes, dated November 23rd, 1883, addressed to W. W. Bell, in words and figures following, to wit:

"BUFFALO, 11, 23, 1883.

"W. W. Bell, Esq., cashier, Bradford.

"SIR: I enclose for collection and remittance deed of J. M. and D. B. Wiggins, for which please remit us your draft on N. Y., 4,750, & two notes given by Bayne, Fuller & Melvin, 2,500 each, at 3 & 6 months, with interest, to order D. B. Wiggins.

"Yours truly, E. W. HAYES, *C.*"

To the foregoing offer defendants objected in words following, to wit:

"Objected to as incompetent for any purpose in this case."

And further objected to by defendants in words following, to wit:

"Objected to as incompetent and inadmissible."

The court overruled the objections and admitted the letter in evidence in words following, to wit:

"I do not see that he says anything in this corespondence that is against the defendants—anything more than he explains the transactions as they occur. I think that is about all there is of it. One of these letters, I understood the witness to say, was written at the request of the defendants. I think I will receive these letters."

To which decision of the court the defendants excepted and prayed the court to seal this bill of exceptions, which is accordingly done.

Which decision of the court the defendants respectfully submit was wrong and therein the court committed error.

196 *Fourth Bill of Exceptions.*

Upon the trial of the issue in this cause, after the testimony was concluded, the defendants presented to the court the following points, herein set forth at length, with the answers of the court thereto:

The defendants' counsel respectfully ask the court to charge the jury that "the contract for the sale of the premises described in the plaintiffs' declaration being in parol and there being no evidence that any possession thereof was taken by the defendants under and pursuant to the contract, there can be no recovery of the purchase price by the vendor unless the contract was fully executed by the delivery of a good and indefeasible deed for the land accepted by the vendees."

To the foregoing point the court answered as follows, to wit:

"The answer of the court to that point is this: This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective."

To which answer of the court defendants excepted and prayed the

court to seal this bill of exceptions, which were taken before verdict, and the bill is accordingly sealed.

The defendants respectfully submit that the foregoing decision of the court is wrong; that their said point should have been affirmed without qualification, and the court in making such qualification committed error.

197 *Fifth Bill of Exceptions.*

Upon the trial of the issue in this cause, after evidence was closed the defendant submitted to the court the following point and asked the court to charge the jury as follows:

"2nd. That until such delivery and acceptance the arrangement rested entirely in parol, and was ineffectual to pass the title to the land to the vendees and render them liable to the vendor for the purchase-money by reason of the statute of frauds and perjuries."

Which point was answered by the court in words as follows:

"This point is affirmed, with the qualification expressed in the answer to the first point, and that I will again read you:

"This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective.

"The first deed was undoubtedly defective and very seriously so. Notwithstanding, if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiffs to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

To which answer of the court to the foregoing point the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

The defendants respectfully submit that in the foregoing answer and decision the court erred and should have affirmed said point without qualification.

198 *Sixth Bill of Exceptions.*

Upon the trial of the issue in this cause, after conclusion of the evidence, the defendants submitted to the court the following point and asked the court to charge the jury as follows:

"3rd. If the defendants agreed in parol that the money and notes which were to be the consideration of the purchase should be delivered by Bell to the plaintiff on receipt of the deed from her the defendants had the right to rescind the agreement at any time before the receipt by Bell of such deed and the delivery of the money and notes to her." The court answered said point in the words following, to wit:

"This point is affirmed with the explanation that a rescission so effected would leave the defendants liable to an action for damages—that is to say, this contract being a parol contract any time before it was consummated the defendants had a right to notify Bell neither to accept the deed nor to transmit the money and notes, subject to their liability to an action for damages, such damages as the plaintiff might sustain."

To which answer of the court to the foregoing point defendants excepted before verdict and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer of the court the defendants submit there was error.

Seventh Bill of Exceptions.

Upon the trial of the issue in this cause the defendants, after the evidence was closed, submitted the following point to the court and asked the court to charge the jury as follows:

"4th. If no notes or money were placed in the hands of Bell at the time of or subsequent to the alleged agreement by Fuller and Bayne that the deed should be forwarded to him, Bell, and the money and notes delivered to the plaintiff in payment of the
199 consideration and it was so known and understood by Wiggins, then there was nothing done by Bayne and Fuller towards an execution of the contract on their part, and they had a right and were at liberty to rescind it by notice to Bell not to receive the deed."

The court answered the foregoing point in the words following, to wit:

"This point is affirmed, with the explanation I have already given; that it would leave them open to an action for damages."

To the foregoing answer of the court to defendants' fourth point the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer the defendants respectfully submit the court erred.

Eighth Bill of Exceptions.

Upon the trial of the issue in this cause, after the evidence was closed, defendants submitted to the court the following point and requested the court to charge the jury as follows, to wit:

"6th. If Wiggins agreed with Bayne and Fuller to convey to the defendants land the title to which was in his wife without disclosing her ownership, they had a right to refuse to execute the contract on that account when they learned that fact."

Which point and request of defendants the court refused in the words following, to wit:

"This point is refused."

To which answer of the court the defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

The defendants respectfully submit that the court erred in refusing the foregoing point.

200 *Ninth Bill of Exceptions.*

Upon the trial of the issue in this cause the defendants, after the evidence had closed, submitted to the court the following point and asked the court to charge the jury in words as follows, to wit:

"9th. There being no tender of the deed to Melvin, then there is no execution of this contract by the plaintiff as to him. He is not liable for the purchase price, either individually or jointly with Fuller and Bayne, and the verdict should be for the defendants."

The court answered the foregoing ninth point of defendants in words as follows, to wit:

"This point is refused. If Mr. Melvin subsequently acquiesced in or ratified this contract, of which there is some evidence, in my judgment, a tender to him individually was not necessary. When I say 'some evidence, in my judgment,' I mean some evidence to go to the jury. I do not mean to intimate any opinion on the effect of that evidence."

To which answer of the court to the foregoing point defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer of the court to the foregoing point the defendants respectfully submit the court erred.

Tenth Bill of Exceptions.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the court the following point and asked the court to charge the jury as follows, to wit:

"10th. There is no evidence to submit to the jury that Melvin agreed to make the purchase with Bayne and Fuller or subsequently ratified it or had any knowledge of such an arrangement before the commencement of this suit."

The court refused the foregoing tenth point of defendants in words as follows, to wit:

201 "This point is refused. That is not my recollection of the evidence, but what the testimony is upon that point is exclusively for you. All that I say is that it is for you to decide that and not the court, and I therefore decline the point."

To which answer by the court of defendants' tenth point defendants excepted before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer by the court to the foregoing point defendants respectfully submit there was error.

Eleventh Bill of Exceptions.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the court and asked the court to charge the jury as follows:

"12th. That under the pleadings in the case the plaintiff is bound to show a good title to the premises as vested in her, and not having so shown she cannot recover in this case."

The court answered and refused the foregoing twelfth point of defendants in words as follows:

"This point is refused."

The counsel for defendants excepted to the foregoing answer to defendants' twelfth point before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which answer and decision of the court the defendants respectfully submit there was error.

Twelfth Bill of Exceptions.

Upon the trial of the issue in this cause the court, in charging the jury, said to them as follows in answering defendants' second point:

"That if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs, on November 27th, 1883, executed and on November 28th, 1883,
202 transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract. Notwithstanding the first deed was defective—the first deed was undoubtedly defective, and very seriously so—notwithstanding if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiff to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

The defendants excepted to that part of the charge of the court before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which answer and decision of the court to defendants' foregoing point the defendants respectfully submit the court erred.

Thirteenth Bill of Exceptions.

In the trial of the issue in this cause the court failed to properly instruct the jury what would be an acceptance of the deed or deeds by the defendants, and the defendants excepted to the charge before verdict, and prayed the court to seal this their bill of exceptions, which is accordingly done.

In which failure to so instruct the jury the defendants respectfully submit the court erred.

Defendants respectfully submit that the court erred in its charge to the jury in not instructing them that the mere retention by Bell or defendants of the first deed of November 22nd, 1883, did not constitute an acceptance of the same by the defendants.

203 Defendants respectfully submit that the court erred in its charge to the jury in not charging that there was no evidence of the acceptance of the deed of November 22nd, 1883, by defendants.

Defendants respectfully submit that the court erred in its charge to the jury in not instructing them that there was no evidence that the defendants accepted either of the deeds offered in evidence.

Defendants respectfully submit that the court erred in its charge to the jury in not charging that all the evidence on the subject showed that the defendants repudiated the deed of November 22nd, 1883, and refused to accept the same, and required the plaintiffs to execute a new deed before they would carry out the parol agreement.

Defendants respectfully submit that the court erred in not charging the jury that the deed of November 22nd, 1883, was utterly void and was not afterward perfected or in any way aided by the execution of the second deed or otherwise.

Defendants respectfully submit that the court erred in not charging the jury that there was not any evidence that the defendants accepted either deed offered in evidence, and that the plaintiff could not recover the purchase price agreed by the parol agreement to be paid for the land.

The defendants respectfully submit that the court erred in overruling the motion for a new trial in this case.

The defendants respectfully submit that the verdict is against the weight of evidence and the court erred in not granting a new trial.

R. BROWN,
M. F. ELLIOTT,
Att'ys for Pl'ffs in Error.

[Endorsed:] Specifications of error.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 151. S. G. Bayne, J. M. Fuller, and T. J. Melvin, plaintiffs in error, *vs.* D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins. Filed October 6, 1887.

Brief of Plaintiffs in Error.

Supreme Court

OF THE UNITED STATES.

October Term, 1890,

No. 151.

S. G. Bayne, J. M. Fuller, and T. J. Melvin, Plaintiffs in Error and Defendants Below,

VERSUS

D. B. Wiggins and Jane M. Wiggins, his Wife, in Right of the said Jane M. Wiggins, Defendants in Error and Plaintiffs Below.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

R. BROWN,
M. F. ELLIOTT,
F. E. WATROUS,
Attorneys for Plaintiffs in Error.

ADVANCE PRINT, WELLSBORO, PA.

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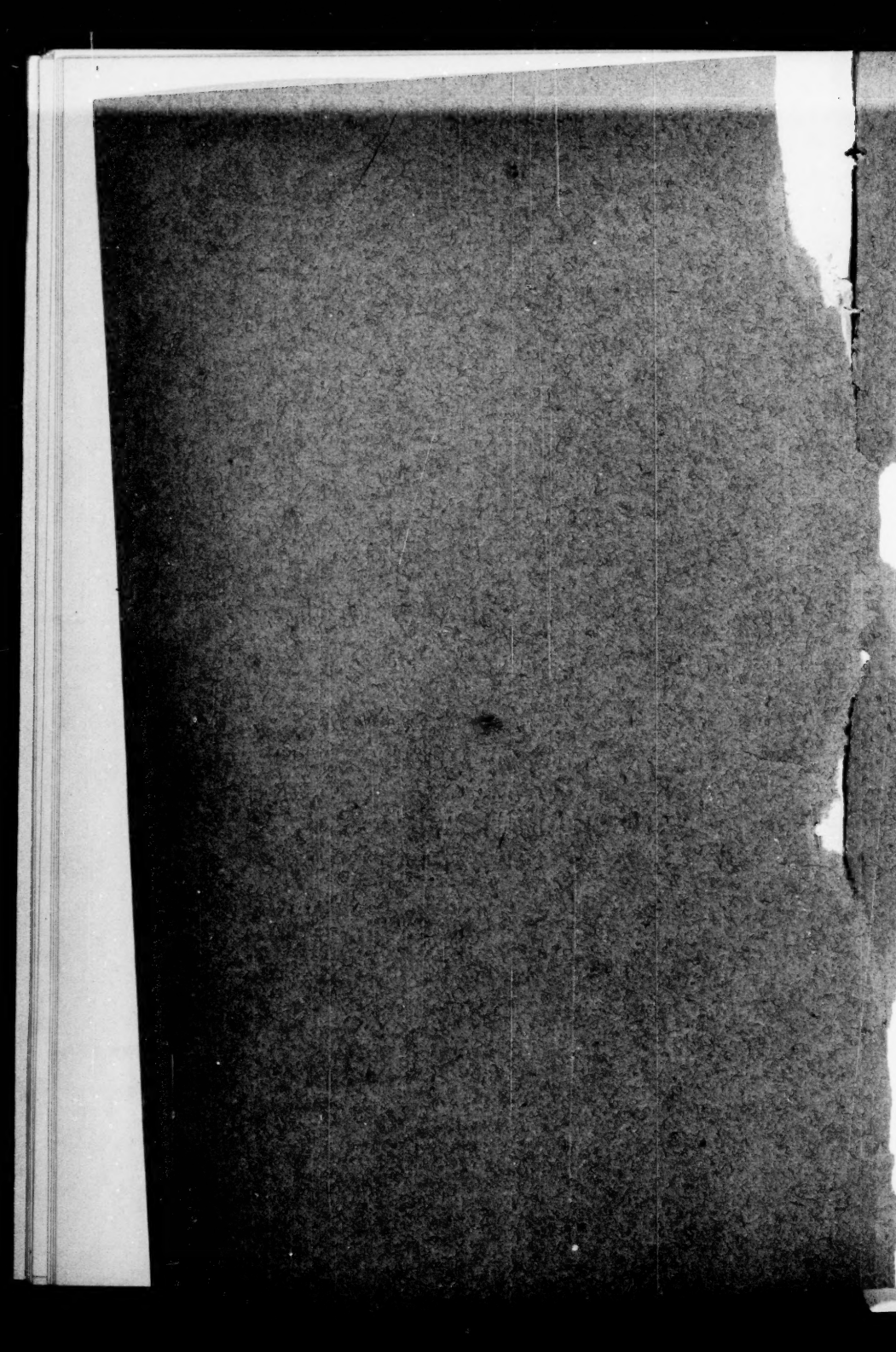
In Error to the Circuit Court of the United States for the Western District af Pennsylvania.

R. BROWN,
M. F. ELLIOTT,
F. E. WATROUS,
Attorneys for Plaintiffs in Error.

AGITATOR PRINT, WELLSBORO, PA.



The Supreme Court of the United States.

OCTOBER TERM, 1890, NO. 151.

S. G. BAYNE, J. M. FULLER, AND T. J. MELVIN,
Plaintiffs in Error and Defendants Below,

VS.

D. B. WIGGINS AND JANE M. WIGGINS, HIS WIFE, IN RIGHT OF THE SAID JANE M. WIGGINS, Defendants in Error and Plaintiffs Below.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

This action was brought originally in the Court of Common Pleas of McKean County, Pennsylvania, by D. B. Wiggins and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins against S. G. Bayne, J. M. Fuller and T. J. Melvin, and on the petition of the plaintiffs was removed to the United States Circuit Court for the Western District of said State.

The declaration, as originally filed, contained two counts in which the plaintiffs alleged that D. B. Wiggins,

as agent for his wife, made a parol agreement with the defendants to sell to them a certain tract of land situated in McKean County, Pennsylvania, for the price or sum of ten thousand dollars; and that the plaintiffs executed and acknowledged in due form of law a deed for the said land and tendered the same to the defendants, which they refused to receive, and pay the sum of money which they had agreed to do by the terms of the said parol agreement. Upon this declaration the action was to recover the damages sustained by the plaintiffs in consequence of the defendants' failure to perform their parol agreement to purchase said land.

See pages 2, 3, 4 and 5 of Record.

On the day the case was called for trial in the Circuit Court the plaintiffs, by leave of the Court, filed a new count to the declaration.

Record, pages 5 and 6.

In this count the plaintiffs aver that Jane M. Wiggins did on the 21st day of November, A. D. 1883, sell unto the defendants the said tract of land for the price or sum of ten thousand dollars, and that on the 28th day of November, A. D. 1883, she delivered a good and sufficient deed of said premises to the defendants and put them in possession and thereby became entitled to receive the said sum of ten thousand dollars, which the defendants had neglected and refused to pay.

The third count is entirely inconsistent with the other two.

The facts as proved on the trial are as follows:

On the 20th day of November, A. D. 1883, D. B. Wiggins, husband of Jane M. Wiggins, then residing at the city of Buffalo, State of New York, went to the office of Bayne & Fuller, two of the defendants, in the city of Bradford, State of Pennsylvania, and made inquiries of Mr. Fuller as to the responsibility of one F. N. Bansdall, at the same time informing him that

Bansdall desired to purchase the tract of land in controversy. Wiggins then offered to sell the land to Fuller if he did not sell to the parties he was then negotiating with.

On the next day, the 21st of November, Wiggins made a parol bargain with Bayne & Fuller to sell them the land for $10,000, and received two hundred and fifty dollars as a part of the purchase price.

Wiggins made the parol contract as owner.

After the bargain had been made Wiggins, Bayne and Fuller went into the First National Bank of Bradford and made an arrangement with W. W. Bell, cashier, that Wiggins should forward to Bell a good deed for the land and Bayne & Fuller should pay over to Bell, to be forwarded by him to Wiggins, $4,750 in money and two notes of $2,500 each, one payable three and one six months after date. The money was not paid over and the notes were never executed or delivered to Bell.

Wiggins knew that the defendants had not deposited the money and notes with Bell.

Record, page 49.

On or about the 23d day of November, 1883, D. B. Wiggins and his wife, Jane M. Wiggins, executed to the defendants a deed of the land and, through a Buffalo bank, forwarded it to W. W. Bell. Just when Bell received it does not clearly appear. Bell testified that he showed the deed to N. B. Smiley, an attorney who at that time represented the Bank of which Bell was the cashier, and who was also the attorney of Bayne & Fuller.

Smiley pronounced the deed fatally defective for the reason that it was not properly acknowledged by Mrs. Wiggins, who claimed to own the land.

The certificate of the Notary Public before whom the acknowledgement was taken did not show that the full contents of said deed were made known to Mrs. Wig-

gins, as the statute of Pennsylvania provides in order to pass the title of a married woman to lands in that State.

It was conceded on the trial of this case in the Court below that the deed was so defectively executed by Mrs. Wiggins that it would not, if delivered, have passed the title to the defendants.

Bell notified D. B. Wiggins that the deed was defective. Another deed was executed by D. B. Wiggins and wife on the 27th day of November, and Wiggins testified that he forwarded the second deed to Bell on the 28th day of November from Buffalo, and that he went to Bradford on the 30th and tendered the deed to Bell and to Bayne & Fuller and that they declined to receive it, and that he took it away with him and it has remained in his possession ever since.

Record, page 50.

On the 27th day of November, the day before the second deed was sent to Bell, Bayne & Fuller notified Bell that they had determined to rescind the parol contract for the purchase of said land, and directed him not to receive any deed of the same for them, as they would not accept it or pay the purchase price named in said parol contract.

Under the foregoing facts the defendants contended that the plaintiffs could not recover the purchase price of the land, for the reason that the contract between the parties rested in parol up to the time defendants elected to rescind the same, and was not enforceable under the statute of frauds and perjuries in force in Pennsylvania, which requires every grant of real estate to be evidenced by writing signed by the party granting the same.

The Court below recognized this position as a correct statement of a general principle relating to the transfer of real estate in Pennsylvania, but instructed the jury that if the first deed, the one of November 22, 1883, was

accepted by the defendants and at their request the plaintiffs on November 27, 1883, executed, and on November 28, 1883, transmitted to Mr. Bell a second deed and on November 30, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz: Mr. Bayne and Mr. Fuller, this was a suffieient execution of the contract, notwithstanding the first deed was defective.

The defendants contend that there was no evidence showing or tending to show that the first deed was ever accepted by the defendants; also that the first deed was not only defective but void and could not be connected with the second deed so as to render the contract executed as of the time when the first deed was received by Bell.

The defendants also contended that the plaintiffs could not recover against Thomas J. Melvin, one of the defendants, for the reason that there was no evidence to connect him with the transaction, and that if there could be no recovery against him there could be no recovery against any of the defendants. The Court instructed the jury that there was some evidence to go to them of ratification or acquiescence in the contract on the part of Melvin.

The other questions grew out of the admission or rejection of evidence by the Court during the trial, and are raised by defendants' exceptions.

Under the instructions given them by the Court the jury rendered a verdict in favor of the plaintiffs for the alleged purchase price of the land, with interest.

SPECIFICATIONS OF ERROR

ON BEHALF OF THE PLAINTIFFS IN ERROR.

On the trial of the issue in this cause in the Court below the Court erred in its rulings as set out in the bill of exceptions in this case, which are as follows:

FIRST BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the plaintiffs offered in evidence a certain instrument in writing in words and figures as follows, to wit:

BRADFORD, PENNA, Nov. 21st, 1883.

Received $4,750 from Bayne, Fuller, and Melvin, which is the cash payment on a lot of 70 acres of land sold to them by D. B. Wiggins for $10,000, the balance to be paid in notes and money, as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 at three months, $2,500 at six months, both with interest.

(Signed) W. W. BELL, Cashier.

To the foregoing offer defendants objected in words as follows, to wit:

"Objected to as incompetent and irrelevant under the pleadings in this case."

And further objected to by defendants as follows, to wit:

"Objected to as irrelevant and immaterial, and also that all the defendants were not present at the time it was executed."

The Court overruled the objections and admitted the paper in evidence in words as follows, to wit:

"This is a part of the transaction, and two of the defendants, at any rate, were connected directly with it, and it seems to me that it is admissible in evidence. What the effect of it may be — will see further on."

To which decision of the Court the defendants excepted and prayed the Court to seal this bill of exceptions, which is accordingly done.

SECOND BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the plaintiffs offered in evidence an instrument in writing, purporting to be a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

"BRADFORD, PA., 11, 27, 1883.

"E. W. Hayes, Esq, Cas.

"DEAR SIR: I enclose a deed that Bayne, Fuller & Melvin's att'y wishes executed in place of the one sent by you, on receipt of which I will forward money, notes, and old deed. Yours truly,

"W. W. BELL, Cas.

"This is a Pa. form and the other is a N. Y. one."

And at the same time, and in connection with above-mentioned letter, the plaintiffs also offered in evidence another instrument in writing, and also purporting to be a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

BRADFORD, PA., 11, 29, 1883.

"E. W. Hayes, Esq., Cas.

"DEAR SIR: By request of Bayne, Fuller & Melvin I return deed of D. B. Wiggins to you. Their attorney has written Mr. Wiggins, giving the reasons for so doing. Yours truly, W. W. BELL, Cas."

And at the same time, and in connection with the two letters last above mentioned, the plaintiffs also offered another instrument in writing, and purporting to be a letter from W. W. Bell to the cashier of the Bank of Commerce of Buffalo, N. Y., in words and figures following, to wit:

BRADFORD, PA., 11, 24, 1883.

"E. W. Hayes, Cas.

"DEAR SIR: Yours of 23d inst. at hand. The search is taking longer than expected, but will probably be completed by Monday. Yours truly,

"W. W. BELL, Cas."

To the foregoing offers of three letters above described defendants objected in words following, to wit:

"Objected to as being simply a declaration of Mr. Bell and not binding or affecting the defendants in any way."

Defendants further objected to said offers in words following, to wit:

"Defendants' counsel object to all the letters as incompetent against the defendants; that they are at most but declarations of this witness."

The Court overruled the objections and admitted the letters in evidence.

The Court used the following words in making above ruling, to wit:

"I don't see that he says anything in this correspondence that is against the defendants—any more than he explains the transactions as they occur. I think that is about all there is of it. One of the letters, I understood the witness to say, was written at the request of the defendants. I think I will receive these letters."

To which decision defendants excepted and prayed the Court to seal this bill of exceptions, which is accordingly done.

In which ruling defendants respectfully submit the Court erred.

THIRD BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the plaintiffs offered in evidence a certain instrument in writing, purporting to be a letter from E. W. Hayes, dated No-

vember 23rd, 1883, addressed to W. W. Bell, in words and figures following, to wit:

"BUFFALO, 11, 23, 1883.

"W. W. Bell, Esq, Cashier, Bradford.

"SIR: I enclose for collection and remittance deed of J. M. and D. B. Wiggins, for which please remit us your draft on N. Y., 4,750, & two notes given by Bayne, Fuller & Melvin, 2,500 each, at 3 & 6 months, with interest, to order D. B. Wiggins. Yours truly,

"E. W. HAYES, C."

To the foregoing offer defendants objected in words following, to wit:

"Objected to as incompetent for any purpose in this case."

And further objected to by defendants in words following, to wit:

"Objected to as incompetent and inadmissible."

The Court overruled the objections and admitted the letter in evidence in words following, to wit:

"I do not see that he says anything in this correspondence that is against the defendants—anything more than he explains the transactions as they occur. I think that is about all there is of it. One of these letters, I understood the witness to say, was written at the request of the defendants. I think I will receive these letters."

To which decision of the Court the defendants excepted and prayed the Court to seal this bill of exceptions, which is accordingly done.

Which decision of the Court the defendants respectfully submit was wrong and therein the Court committed error.

FOURTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after the testimony was concluded, the defendants presented to

the Court the following points, herein set forth at length, with the answers of the Court thereto:

The defendants' counsel respectfully ask the Court to charge the jury that "the contract for the sale of the premises described in the plaintiffs' declaration being in parol and there being no evidence that any possession thereof was taken by the defendants under and pursuant to the contract, there can be no recovery of the purchase price by the vendor unless the contract was fully executed by the delivery of a good and indefeasible deed for the land, accepted by the vendees."

To the foregoing point the Court answered as follows, to wit:

"The answer of the Court to that point is this: This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective."

To which answer of the Court defendants excepted and prayed the Court to seal this bill of exceptions, which were taken before verdict, and the bill is accordingly sealed.

The defendants respectfully submit that the foregoing decision of the Court is wrong; that their said point should have been affirmed without qualification, and the Court in making such qualification committed error.

FIFTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after evidence was closed the defendants submitted to the Court the following point and asked the Court to charge the jury as follows:

"2nd. That until such delivery and acceptance the arrangement rested entirely in parol, and was ineffectual to pass the title to the land to the vendees and render them liable to the vendor for the purchase money by reason of the statute of frauds and perjuries."

Which point was answered by the Court in words as follows:

"This point is affirmed, with the qualification expressed in the answer to the first point, and that I will again read you:

"This point is affirmed with this qualification, that if the first deed, the one of November 22nd, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27th, 1883, executed, and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective.

"The first deed was undoubtedly defective and very seriously so. Notwithstanding, if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiffs to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

To which answer of the Court to the foregoing point the defendants excepted before verdict, and prayed the

Court to seal this their bill of exceptions, which is accordingly done.

The defendants respectfully submit that in the foregoing answer and decision the Court erred and should have affirmed said point without qualification.

SIXTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after conclusion of the evidence, the defendants submitted to the Court the following point and asked the Court to charge the jury as follows:

"3rd. If the defendants agreed in parol that the money and notes which were to be the consideration of the purchase should be delivered by Bell to the plaintiff on receipt of the deed from her the defendants had the right to rescind the agreement at any time before the receipt by Bell of such deed and the delivery of the money and notes to her."

The Court answered said point in the words following, to wit:

"This point is affirmed with the explanation that a rescission so effected would leave the defendants liable to an action for damages—that is to say, this contract being a parol contract any time before it was consummated the defendants had a right to notify Bell neither to accept the deed nor to transmit the money and notes, subject to their liability to an action for damages, such damages as the plaintiffs might sustain."

To which answer of the Court to the foregoing point defendants excepted before verdict and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer of the Court the defendants submit there was error.

SEVENTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the defend-

ants, after the evidence was closed, submitted the following point to the Court and asked the Court to charge the jury as follows:

"4th. If no notes or money were placed in the hands of Bell at the time of or subsequent to the alleged agreement by Fuller and Bayne that the deed should be forwarded to him, Bell, and the money and notes delivered to the plaintiff in payment of the consideration and it was so known and understood by Wiggins, then there was nothing done by Bayne and Fuller towards an execution of the contract on their part, and they had a right and were at liberty to rescind it by notice to Bell not to receive the deed."

The Court answered the foregoing point in the words following, to wit:

"This point is affirmed, with the explanation I have already given, that it would leave them open to an action for damages."

To the foregoing answer of the Court to defendants' fourth point the defendants excepted before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer the defendants respectfully submit the Court erred.

EIGHTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after the evidence was closed, defendants submitted to the Court the following point and requested the Court to charge the jury as follows, to wit:

"6th. If Wiggins agreed with Bayne and Fuller to convey to the defendants land the title to which was in his wife without disclosing her ownership, they had a right to refuse to execute the contract on that account when they learned that fact."

Which point and request of defendants the Court refused in the words following, to wit:

"This point is refused."

To which answer of the Court the defendants excepted before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

The defendants respectfully submit that the Court erred in refusing the foregoing point.

NINTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the defendants, after the evidence had closed, submitted to the Court the following point and asked the Court to charge the jury in words as follows, to wit:

"9th. There being no tender of the deed to Melvin, then there is no execution of this contract by the plaintiff as to him. He is not liable for the purchase price, either individually or jointly with Fuller and Bayne, and the verdict should be for the defendants."

The Court answered the foregoing ninth point of defendants in words as follows, to wit:

"This point is refused. If Mr. Melvin subsequently acquiesced in or ratified this contract, of which there is some evidence, in my judgment, a tender to him individually was not necessary. When I say 'some evidence, in my judgment,' I mean some evidence to go to the jury. I do not mean to intimate any opinion on the effect of that evidence."

To which answer of the Court to the foregoing point defendants excepted before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer of the Court to the forgoing point the defendants respectfully submit the Court erred.

TENTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the Court the following point and asked the Court to charge the jury as follows, to wit:

"10th. There is no evidence to submit to the jury that Melvin agreed to make the purchase with Bayne and Fuller or subsequently ratified it or had any knowledge of such an arrangement before the commencement of this suit."

The Court refused the foregoing tenth point of defendants in words as follows, to wit:

"This point is refused. That is not my recollection of the evidence, but what the testimony is upon that point is exclusively for you. All that I say is that it is for you to decide that and not the Court, and I therefore decline the point."

To which answer by the Court of defendants' tenth point defendants excepted before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which decision and answer by the Court to the foregoing point defendants respectfully submit there was error.

ELEVENTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause, after the evidence had closed, the defendants submitted to the Court and asked the Court to charge the jury as follows:

"12th. That under the pleadings in the case the plaintiff is bound to show a good title to the premises as vested in her, and not having so shown she cannot recover in this case."

The Court answered and refused the foregoing twelfth point of defendants in words as follows:

"This point is refused."

The counsel for defendants excepted to the foregoing answer to defendants' twelfth point before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which answer and decision of the Court the defendants respectfully submit there was error.

TWELFTH BILL OF EXCEPTIONS.

Upon the trial of the issue in this cause the Court, in charging the jury, said to them as follows in answering defendants' second point:

"That if the first deed, the one of November 22d, 1883, was accepted by the defendants, and at their request the plaintiffs, on November 27th, 1883, executed and on November 28th, 1883, transmitted to Mr. Bell a second deed, and on November 30th, 1883, said second deed was tendered by plaintiff to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract, notwithstanding the first deed was defective—the first deed was undoubtedly defective, and very seriously so—notwithstanding if you find from all the evidence that that deed was accepted by the defendants, and that they called upon the plaintiff to execute a more perfect conveyance, and that was done and transmitted to Mr. Bell and then tendered to the defendants, that would be a compliance with the requirements of the law."

The defendants excepted to that part of the charge of the Court before verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which answer and decision of the Court to defendants' foregoing point the defendants respectfully submit the Court erred.

THIRTEENTH BILL OF EXCEPTIONS.

In the trial of the issue in this cause the Court fail-

ed to properly instruct the jury what would be an acceptance of the deed or deeds by the defendants, and the defendants excepted to the charge before the verdict, and prayed the Court to seal this their bill of exceptions, which is accordingly done.

In which failure to so instruct the jury the defendants respectfully submit the Court erred.

Defendants respectfully submit that the Court erred in its charge to the jury in not instructing them that the mere retention by Bell or defendants of the first deed of November 22nd, 1883, did not constitute an acceptance of the same by the defendants.

Defendants respectfully submit that the Court erred in its charge to the jury in not charging that there was no evidence of the acceptance of the deed of November 22nd, 1883, by defendants.

Defendants respectfully submit that the Court erred in its charge to the jury in not instructing them that there was no evidence that the defendants accepted either of the deeds offered in evidence.

Defendants respectfully submit that the Court erred in its charge to the jury in not charging that all the evidence on the subject showed that the defendants repudiated the deed of November 22nd, 1883, and refused to accept the same, and required the plaintiffs to execute a new deed before they would carry out the parol agreement.

Defendants respectfully submit that the Court erred in not charging the jury that the deed of November 22nd, 1883, was utterly void and was not afterward perfected or in any way aided by the execution of the second deed or otherwise.

Defendants respectfully submit that the Court erred in not charging the jury that there was not any evidence that the defendants accepted either deed offered in evidence, and that the plaintiff could not recover

the purchase price agreed by the parol agreement to be paid for the land.

The defendants respectfully submit that the Court erred in overruling the motion for a new trial in this case.

The defendants respectfully submit that the verdict is against the weight of evidence and the Court erred in not granting a new trial.

R. BROWN,
M. F. ELLIOTT,
F. E. WATROUS,
Attorneys for Plaintiffs in Error.

BRIEF OF ARGUMENT

ON BEHALF OF THE PLAINTIFFS IN ERROR.

This action as originally brought was to recover damages sustained by the plaintiffs, on account of the refusal of the defendants to execute a parol contract for the sale and purchase of a tract of land situated in the County of McKean, and State of Pennsylvania. At the trial the plaintiffs changed front and filed an additional count to their declaration, in which they alleged that Jane M. Wiggins, wife of D. B. Wiggins, had sold said tract of land to the defendants for the sum of ten thousand dollars and had executed and delivered to them a good and sufficient deed therefor, and the defendants had taken possession thereof, and that the defendants had neglected and refused to pay the purchase price, and suit was brought to recover the same

Whatever contract existed between the parties was oral and was made on the 21st day of November, A. D. 1883, between D. B. Wiggins (claiming to act for himself) and the defendants.

A deed for the land was to be forwarded to W. W.

Bell, cashier of the bank at Bradford city, Pennsylvania, and the defendants were to pay, on the delivery of the same by Bell, a certain sum in money and give their notes for the balance of the purchase price.

The contract resting in parol was void under the Pennsylvania statute of frauds and perjuries, which is as follows:

"SEC. 1. All leases, estates, interest of freehold or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding, except, nevertheless, all leases not exceeding the term of three years from the making thereof.

"SEC. 2. And moreover, no leases, estates or interests either of freehold or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time be assigned, granted or surrendered unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law."

Purdon's Digest of laws of Pennsylvania, page 830–1. Act of 21 March, 1772.

"A contract for the sale of lands is within the statute of frauds and therefore void and unenforceable, if parol testimony be required to establish any essential part of it.

"The alleged vendor's receipt for a payment on ac-

count of the price to be paid to me for a lot of ground fronting about 190 feet on the P. R. R. in the Twenty-first ward, Pittsburg, failing to identify and describe the land sold, is inadmissible in proof of title."

James R. Mellon vs. Thos. K. Davison, 123 Penn'a State Reports, 298.

To same effect, Hammer vs. McEldowney, 46 Penn'a State Reports, 334.

Ferguson vs. Staver, 33 Penn'a State Reports, 411.

"Specific performance of an unexecuted parol contract for the sale of land cannot be enforced by action for the purchase money and a conditional verdict."

Irvine vs. Bull, 4 Watts, 287.

Wilson vs. Clarke, 1 Watts & Sergeant, 554.

Dumars vs. Miller, 34 Penn'a State Reports, 319.

"A parol contract though accompanied by payment of purchase money conveys no interest that may be taken in execution."

Miller vs. Specht, 11 Penn'a State Reports, 449.

On the 23rd of November, 1883, D. B. Wiggins and Jane M. Wiggins his wife, signed a deed, and imperfectly acknowledged the same, for the land covered by the parol contract between D. B. Wiggins and the defendants; Wiggins forwarded said deed from the city of Buffalo to Bell, at the city of Bradford, Pennsylvania. When this deed was received by Bell, the defendants learned for the first time that Mrs. Wiggins claimed to be the owner of the land instead of her husband, D. B. Wiggins.

This deed was not executed in such a manner by Mrs. Wiggins as to pass her title, and as to her was void.

The statute of Pennsylvania which provides for the conveyance of the lands of married women is as follows:

"SEC. 2. Where any husband and wife shall hereafter incline to dispose of and convey the estate of

the wife, or her right of, in or to any lands, tenements or hereditaments whatsoever, it shall and may be lawful to and for the said husband and wife to make, seal, deliver and execute any grant, bargain and sale, lease, release, feoffment, deed, conveyance or assurance in the law whatsoever, for the lands, tenements and hereditaments intended to be by them passed and conveyed, and after such execution, to appear before one of the Judges of the Supreme Court, or before any Justice of the County Court of Common Pleas of and for the county where such lands, tenements or hereditaments shall lie, and to acknowledge the said deed or conveyance, which Judge or Justice shall, and he is hereby authorized and required to take such acknowledgement, in doing whereof he shall examine the wife separate and apart from her husband, and shall read or otherwise make known the full contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily and of her own free will and accord, seal, and as her act and deed, deliver the said deed or conveyance without any coercion or compulsion of her said husband, every such deed or conveyance shall be, and the same is hereby declared to be good and valid in law, to all intents and purposes, as if the said wife had been sole, and not covert, at the time of such sealing and delivery, any law, usage and custom to the contrary in anywise notwithstanding.

"SEC. 3. All deeds and conveyances made and executed by husband and wife, not residing within this province, and brought hither to be recorded in the county where the lands lie (the acknowledgments thereof being taken and made in the manner hereinbefore directed, before any Mayor or chief magistrate, or officer of the cities, towns or places where such deeds or conveyance are or shall be made or executed, and certified under the common or public seal of such cities,

towns or places), shall be as valid and effectual in law, as if the same had been made and acknowledged in manner aforesaid, before any Judge of the Supreme Court of this province, or before any Justice of the Court of Common Pleas for the county where the lands lie, anything herein contained to the contrary notwithstanding."

Purdon's Digest of Laws of Pennsylvania, pages 568 –9. Act of 24 February, 1770.

It does not appear by the certificate of the Notary Public before whom the acknowledgment was taken, that the full contents of the deed was made known to her by said Notary before she acknowledged the same.

Record, page 29.

This omission rendered the deed, as to Mrs. Wiggins, who claimed to own the title, void.

The acknowledgment, and that in the manner provided by the statute above quoted, is a part of the execution of a deed by a married woman as much as the signing of her name thereto.

"The certificate of the acknowledgment of the deed of a married woman for the conveyance of her lands should exhibit on the face of it, at least a substantial compliance with the provisions of the Act of Assembly of the 24th of February, 1770. Therefore, if a certificate state that the husband and wife personally appeared before the magistrate 'and acknowledged the indenture to be their act and deed and desired the same to be recorded, she being of full age and by him examined apart,' it is insufficient to pass the real estate of the wife."

Watson vs. Mercer and another, 6 Sergeant & Rawle, 49.

"To make the deed of a married woman valid to bar her dower, it must appear, from the certificate of the magistrate before whom it was acknowledged, that all

the requisites of the Act of Assembly have been substantially complied with."

Fowler vs. McClurg and others, 6 Sergeant & Rawle, 143.

"The substantial requirements of the Act of the 24th of February, 1770, are a separate examination of the wife apart from her husband, her full knowledge of the contents of the deed and her voluntary consent to its execution."

Miller et al. vs. Wentworth, 82 Penn'a State Reports, 280.

"To make the deed or mortgage of a married woman of her land valid it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its contents and that her will was perfectly free and that her mind accorded with the act. These facts can only be proved by the certificate of the magistrate."

Louden vs. Blythe, 27 Penn'a State Reports, 22.

"The certificate in the present case states the separate examination of the wife and that she declared she signed, sealed and delivered the same without any coercion or compulsion of her said husband. *To be valid as against her it must also state substantially that the contents were made known to her.*"

Hornbeck et ux. vs. Mutual Building and Loan Association of Elizabeth, 88 Penn'a State Reports, 64.

"A Notary Public who, having taken the acknowledgment of the grantees to a deed, indorses thereon a defective certificate of such acknowledgment cannot subsequently in the absence of the grantors cure such defect by a second certificate in due form, of the original acknowledgement."

Enterprise Transit Company vs. Sheedy et al., 103 Penn'a State Reports, 492.

In the case last cited the Notary omitted to state

in his first certificate that he made known to the married woman the full contents of the instrument.

It seems to us very clear under the statute and the decisions of the Supreme Court of Pennsylvania that the deed of the 23d of November, 1883, was not merely voidable but absolutely void and of no greater force, so far as passing the title of Mrs. Wiggins to the land, than a blank sheet of paper, and should not have been considered in determining the question whether the parol contract was executed by the execution and delivery of a deed for the premises.

D. B. Wiggins was informed that the deed was improperly executed, and a new deed was prepared and sent to him by Bell to be executed by himself and wife. That deed was executed on the 27th day of November, 1883. [Record, page 32.] And Wiggins testified that he forwarded it to Bell from Buffalo on the 28th of November. [Record, page 45.] Bell testified that he never received the second deed after it was executed. [Record, page 76.]

Wiggins testified that on the 30th of November he went to Bradford, taking the second deed with him, to see what the trouble was,—went over to the bank and demanded the money and notes,—saw Bell. He and his attorney then saw Bayne and Fuller. Mr. George, Wiggins's attorney, wanted to know of them why they did not accept the deed, etc. [Record, page 46.]

Wiggins took the deed away with him and it has been in his possession ever since. [Record, page 50.]

Fuller and Bayne testified that they never knew of the existence of the second deed until the 30th of November, when Wiggins had it with him at their office in Bradford, and this evidence is uncontradicted. [Record, page 61.]

On the 27th or 28th of November, 1883, Bayne and Fuller notified Bell not to receive any deed of the land for them. [Record, pages 68–73–77.]

N. B. Smiley by direction of Bayne and Fuller wrote a letter to D. B. Wiggins on the 27th of November, 1883, in which he stated that the defendants declined to purchase the land. [Record, page 45.]

In the light of these undisputed facts the defendants requested the Court to charge the jury in their first point as follows:

"That the contract for the sale of the premises described in the plaintiffs' declaration being in parol, and there being no evidence that any possession thereof was taken by the defendants under and pursuant to the contract, there can be no recovery of the purchase price by the vendees unless the contract was fully executed by the delivery of a good and indefeasible deed for the land, accepted by the vendees."

Instead of an unqualified affirmance of the point the Court answered it as follows:

"The answer of the Court to that point is this: This point is affirmed with this qualification,—that if the first deed, the one of November 22, 1883, was accepted by the defendants, and at their request the plaintiffs on November 27, 1883, executed and on November 28, 1883, transmitted to Mr. Bell a second deed and on November 30, 1883, such second deed was tendered by plaintiffs to two of the defendants, viz., Mr. Bayne and Mr. Fuller, this was a sufficient execution of the contract notwithstanding the first deed was defective."

This answer to the defendants' first point constitutes our fourth bill of exceptions, and if the Court committed an error in their answer the same error runs through the entire charge. It must be conceded that the parol contract was not enforceable; that the first deed was void, and that the defendants notified D. B. Wiggins and Bell before Bell could have received the second deed that they would not carry out the contract, and that they refused to accept the second deed when

offered to them by Wiggins on the 30th of November, 1883, and that Wiggins kept the deed and still has it in his possession.

How, then, can the answer of the Court to our first point be justified?

There is not any evidence that the defendants accepted the first, void deed. So far as appears by the evidence they never saw it. Bell showed it to their attorney, and he pronounced it defective and a new deed was prepared and returned to D. B. Wiggins.

Bell never offered it to the defendants, nor did they pay him for Wiggins or place in his hands any portion of the purchase money or securities in accordance with the terms of the parol agreement. [Record, pages 66 and 73.] Wiggins knew that the purchase money and notes were not placed in Bell's hands at the time Bell executed the memorandum bearing date November 21, 1883. [Record, page 49.]

No interest in the land passed to the defendants by the parol contract; no title was vested in them by the first deed even though it had been delivered, because it was void. Suppose the second deed had never been executad, would it be contended that the plaintiffs could have recovered the sum the defendants agreed to pay for a conveyance of the land? Surely not. The title to the land remained in Mrs. Wiggins after the deed was signed and sent to Bell precisely the same as before.

The Court below, while conceding that the first deed was void, yet held that if that void deed was delivered, the subsequent offer of a deed properly signed and acknowledged executed the parol contract as of the date of the delivery of the void deed, notwithstanding that before the tender of the second deed the defendants had notified the plaintiffs that they would not carry out the parol contract.

We contend that when this suit was brought the

title to the land was in Mrs. Jane M. Wiggins, the same as before negotiations were begun between her husband and the defendants. Turn the case about. If the defendants in this suit had tendered the purchase price to Mrs. Wiggins and then sought by bill in equity or other proper action to have compelled the specific performance of the contract, upon what could they have based their hopes of success? They would have had a void parol contract, a void deed and the offer of a good deed if it had been delivered and accepted, which at the time of bringing suit was in possession of Wiggins.

If the Court below was correct, the parol contract was executed by the making of a void deed and the offer of a good one.

The cardinal error of the Court below was in holding that the void deed could in any manner be tied to the valid deed, especially as it clearly appears by the evidence that the defendants refused to accept the deed.

There was not the slightest evidence that the defendants took possession of the land in pursuance of the parol agreement and the possession as well as the title still remains in Jane M. Wiggins.

What we have said in reference to the fourth bill of exceptions applies with equal force to the fifth, twelfth and thirteenth exceptions.

The complaint we make in regard to the answers of the Court to the defendants 3d and 4th points, which constitute our sixth and seventh bills of exceptions, is that the Court did not instruct the jury with sufficient certainty as to the character and extent of damages the plaintiffs had a right to recover against the defendants for refusing to carry out the parol contract. The Court said a recovery might be had for such damages as the plaintiff might sustain.

The jury might have understood the Court to mean that they could allow the plaintiffs damages for the

loss of the bargain, which under the decisions of the Supreme Court of Pennsylvania they had no right to do.

"In an action by a vendee against his vendor for the breach of a parol contract for the sale of land, the measure of damages is the amount of purchase money paid with interest and expenses; or if no part of the purchase money has been paid, the expense and trouble incurred by the vendee in endeavoring to procure a title. He cannot in addition where there is no fraud recover damages for the loss of the bargain."

Dumars vs. Miller, 34 Penn'a State Reports, 319.

"In an action to recover damages for the breach of a parol contract to lease or sell land, the measure of damages is the money paid or expenses incurred on the faith of the contract; if no money has been paid or expense incurred the damages are merely nominal."

McCafferty vs. Griswold, 99 Penn'a State Reports, 270.

The ninth and tenth bills of exceptions may be properly considered together.

There was no testimony given which showed or tended to show that T. J. Melvin, one of the defendants, was a party to the parol agreement, or knew afterwards that it had been made. He did not know anything about the execution or delivery or tender of either deed, and the jury should have been instructed that there could be no recovery against him and therefore that the verdict should be for the defendants.

The only evidence upon the subject is the testimony of James George, the attorney of record for the plaintiff. He testified that he had a conversation with Mr. Melvin a few days before the trial, in which Melvin said there was no question but that they had bought this property. [Record, page 55.] Upon this loose declaration, made a few days prior to the trial, to the plaintiff's attorney, Mr. Melvin is to be made liable if

at all. We submit that there was not enough in that declaration to submit to the jury upon the subject of his connection with the purchase of the land.

Eleventh exception.

We submit that it was incumbent upon the plaintiffs to show that she had a good title to the land before she was entitled to a verdict for the purchase price.

The first, second and third exceptions relate to the admission of certain papers and letters.

The paper covered by the first exception was signed by W. W. Bell, Cashier, and we are unable to see how that was competent evidence against the defendants, especially T. J. Melvin, who was not present when it was executed, and it was not shown that he ever knew of its existence until produced on the trial.

The letters of Bell evidenced in the second exception were not shown to have been written by the direction of the defendants, or that they saw them or knew their contents. We do not think the defendants should have been prejudiced by the introduction in evidence of those letters.

The letter of E. W. Hayes set forth in the third exception certainly was not evidence against the defendants, especially as there is no evidence that they ever saw it until it was offered in evidence.

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